

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
APPENDIX**



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# 75-2010

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United States Court of Appeals  
FOR THE SECOND CIRCUIT  
Docket No. 75-2010

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UNITED STATES ex rel. Nancy Rosner, on behalf of  
FRANK CIAPPETTA,

*Appellant,*

—v.—

WARDEN, Sing Sing Prison, Ossining, New York,  
*Appellee.*

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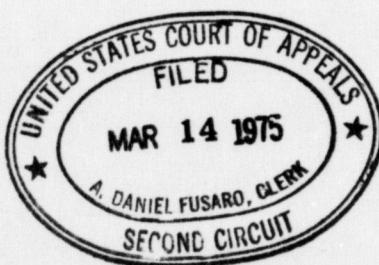
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## APPELLANT'S APPENDIX

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NOTICE OF APPEAL

A 1

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
UNITED STATES ex rel. NANCY ROSNER, :  
on behalf of FRANK CIAPETTA,

Petitioner, : 74 Civil 1643 (CBM)

- against - :  
WARDEN, Sing Sing Prison, Ossinir, ,

NOTICE OF APPEAL

New York, :  
Respondent. :  
----- x

S I R S :

PLEASE TAKE NOTICE that the petitioner above named hereby appeals to the United States Court of Appeals for the Second Circuit from the opinion and order of this Court entered October 1, 1974, denying a petition for writ of habeas corpus and dismissing said petition, and from each and every part thereof, a certificate of probable cause having been granted by this Court on December 20, 1974.

Dated: New York, New York  
January 3, 1975

Yours, etc.

ROSNER, FISHER & SCRIBNER  
Attorneys for Petitioner  
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New York, New York 10013  
212/925-8844

TO:

Hon. Louis Lefkowitz  
Attorney General  
State of New York  
2 World Trade Center  
New York, New York 10047

Clerk  
United States District Court  
United States Courthouse at Foley Square  
New York, New York 10007

ORDER APPEALED FROM

A 2

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

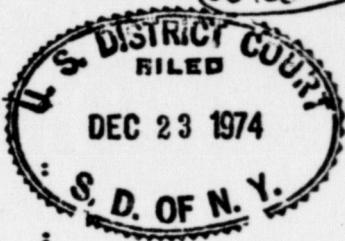
UNITED STATES ex rel. NANCY ROSNER,  
on behalf of FRANK CIAPETTA,

Petitioner, -

-against-

WARDEN, Sing Sing Prison,  
Ossining, New York,

Respondent. : - - - - -



74 CIV. 1643

O R D E R

Application for a certificate of probable cause having been made on the record at the hearing held on December 16, 1974, and the court having determined that a substantial question exists as to the voluntariness of a plea where counsel wrongly advised a defendant that a sentencing alternative existed where in fact such alternative was unavailable, said application is granted. 28 U.S.C. § 2253.

Dated: New York, New York

December 20, 1974

SO ORDERED

*Constance Baker Motley*  
CONSTANCE BAKER MOTLEY  
U. S. D. J.  
DEC 23 1974

PETITION

A 3

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES ex rel. NANCY ROSNER,  
on behalf of Frank Ciappetta,

Petitioner,

PETITION

-against-

WARDEN. Sing Sing Prison, Ossining,  
New York,

Respondent.

-----X

TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

1. Your petitioner is the attorney for Frank Ciappetta and has been authorized by him to make this petition for a writ of habeas corpus on his behalf.

2. On June 15, 1954 Frank Ciappetta and others were indicted in Bronx County Court for the crime of murder in the first degree. A copy of the indictment is annexed hereto as Exhibit "A". On May 2, 1955 Ciappetta withdrew his not guilty plea and entered a plea of guilty to murder in the second degree. On June 24, 1955 the Hon. Eugene G. Schulz sentenced Ciappetta to the mandatory term of imprisonment of 20 years to life. A copy of the minutes of sentence are annexed hereto as Exhibit "B".

3. Subsequently, Ciappetta and his co-defendant Guglielmelli applied to the County Court for a writ of error coram nobis. An evidentiary hearing was held in the County Court on November 4, 1955. A copy of the minutes of that hearing is annexed hereto as Exhibit "C". On December 6, 1955 Judge Schulz denied the coram nobis application. A copy of his opinion denying the application is annexed hereto as Exhibit "D". No appeal from the order denying the application was ever perfected.

4. A second *doram nobis* application was denied without a hearing by Judge Schulz on April 10, 1960. A copy of his opinion is annexed hereto as Exhibit "E". The Appellate Division, First Department affirmed this action of the court below ~~in 1962~~  
<sup>on</sup>  
~~and leave to appeal to the Court of Appeals of the State of New York was denied.~~

5. The petitioner, Frank Ciappetta is presently detained in the custody of the New York State prison authorities pursuant to the judgment of conviction entered in this case on June 24, 1955.

6. No previous application for the relief sought herein has been made.

7. The undisputed evidence presented upon the *coram nobis* hearing and the County Court's finding of fact established that Ciappetta was 17 years old at the time of the commission of the crime charged and had no prior conflict with the law. At the time of his guilty plea he had been incarcerated in the Bronx House of Detention for a period of eleven months. He was represented by Stephen Fuschino, the same attorney who represented his co-defendant Vincent Guglielmelli. Mr. Fuschino testified without contradiction at the *coram nobis* hearing that Ciappetta was reluctant to plead guilty to second degree murder because the thought that he would be sentenced to 20 years to life disturbed him. Ciappetta pleaded guilty during trial after being informed by Mr. Fuschino that he would be sentenced specially as a youthful offender under Section 2184a of the former Penal Law to the Elmira Reception Center and that under such sentence the maximum term that could be imposed was five years without a mandatory minimum term.

In fact, however, such a sentence could not be imposed because Section 2184a on its face excluded crimes punishable by life imprisonment, and murder in the second degree carried a mandatory term of 20 years to life (former Penal Law §1048). In

addition, during conferences between the Judge and the defense attorney, the court informed the petitioner's lawyer that he thought a reformatory term would not be legal. Despite the Judge's view, and despite the clear words of the statute, the lawyer misrepresented to the petitioner that he had a good chance to be sentenced to the five-year maximum term at the Elmira Reception Center. Were it not for these misrepresentations, Ciappetta would not have pleaded guilty.

8. As more fully set forth in the annexed memorandum of facts and law, which is incorporated in and made a part of the instant petition, the plea must be vacated, since it was made without knowledge of its consequences, in violation of the Due Process Clause of the United States Constitution.<sup>1</sup> In addition, the lawyer's misrepresentations rendered the plea involuntary and unknowing in the constitutional sense, and further denied to petitioner the effective assistance of counsel at the time the plea was entered.

WHEREFORE, petitioner prays that an order be entered granting the writ of habeas corpus pursuant to 28 U.S.C. §2254, and further discharging the petitioner from custody, and that the Court grant any such other and further relief as to this Court may seem just and proper.

---

Petitioner

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

being duly sworn, deposes and says that deponent is the attorney for the relator herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,

addition, during conferences between the Judge and the defense attorney, the court informed the petitioner's lawyer that he thought a reformatory term would not be legal. Despite the Judge's view, and despite the clear words of the statute, the lawyer misrepresented to the petitioner that he had a good chance to be sentenced to the five-year maximum term at the Elmira Reception Center. Were it not for these misrepresentations, Ciappetta would not have pleaded guilty.

8. As more fully set forth in the annexed memorandum of facts and law, which is incorporated in and made a part of the instant petition, the plea must be vacated, since it was made without knowledge of its consequences, in violation of the Due Process Clause of the United States Constitution.<sup>6</sup> In addition, the lawyer's misrepresentations rendered the plea involuntary and unknowing in the constitutional sense, and further denied to petitioner the effective assistance of counsel at the time the plea was entered.

WHEREFORE, petitioner prays that an order be entered granting the writ of habeas corpus pursuant to 28 U.S.C. §2254, and further discharging the petitioner from custody, and that the Court grant any such other and further relief as to this Court may seem just and proper.

---

Petitioner

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

being duly sworn, deposes and says

A 6

and that as to those matters deponent believes it to be true. The grounds for deponent's belief are as follows: documents and papers in the file in this case and continuing communication between deponent and the relator. Deponent further states that the reason this verification is made by deponent and not by relator is that is the relator is incarcerated without the County of New York.

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Sworn to before me this  
day of April, 1974.

MEMORANDUM OF FACTS AND LAW ANNEXED TO PETITION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES ex rel. NANCY ROSNER, on  
behalf of Frank Ciappetta,

Petitioner,

-against-

WARDEN, Sing Sing Prison, Ossining,  
New York,

Respondent.

-----X

MEMORANDUM OF FACTS AND LAW

The petitioner, at the time a 17 year-old boy, was indicted in the Bronx County Court on June 15, 1954 along with other youths -- Vincent Guglielmelli, Philip Bonanno, Jerry Santaniello and Frank Giampetrucci -- for murder in the first degree. The indictment alleged that the five defendants, acting in concert, shot and killed one Ernest Montuoro on June 1, 1954. On May 2, 1955 the petitioner and Guglielmelli pleaded guilty to murder in the second degree, while the other defendants pleaded guilty to first degree manslaughter. On June 24, 1955 Ciappetta and Guglielmelli were sentenced to the mandatory term of 20 years to life imprisonment (former Penal Law §1048), while Bonanno and Giampetrucci were sentenced to 2-1/2 to 5 years. Santaniello received a 5 to 10 year term.

The Coram Nobis Hearing

In November 1955 a coram nobis hearing was held to inquire into the circumstances of the plea.

Stephen Fuschino, an attorney, testified that he represented both the petitioner Ciappetta and his co-defendant Guglielmelli (3,8).\* Prior to trial and during the selection of the jury Fuschino discussed a disposition of the case with the district attorney and was told that the prosecutor would recommend acceptance of a plea to murder in the second degree for both his clients (5-9). At a conference with Judge Schulz, the Judge indicated he would accept such a plea (11-12). Mr. Fuschino told the Judge that the family was concerned about the sentence, and the Judge replied that he would make no promises (12). Mr. Fuschino then suggested that Ciappetta and Guglielmelli might be sentenced to the Elmira Reception Center for an indefinite term not to exceed five years, referring the Court to Section 2184a of the Penal Law which concerned sentences for youths between the ages of 16 and 21 (12). The judge replied that he did not think he could sentence the defendants "under those statutes" (12),\*\* but told Mr. Fuschino that if he thought otherwise he should "look up the law on it." (13). At the next conference

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\* References are to pages of the coram nobis hearing of November 5, 1955.

\*\* Although left unexpressed at the hearing, the court's attitude regarding the unavailability of 2184a was undoubtedly based on the fact that Section 2184a on its face excluded crimes punishable by life imprisonment, and murder in the second degree carried a mandatory maximum term of life in prison.

with the Judge, the lawyer told him that he had "read the section" and felt such a sentence could be a legal one. It was suggested that the lawyer discuss it with Mr. Lee, an assistant district attorney (13). Mr. Lee felt it was not clear in his mind whether a 2184a sentence could be imposed and suggested contacting the warden of Elmira (13).

At a subsequent conference with the court, the Judge said he received a letter from the warden of Elmira but commented "he didn't like the letter . . . it was not to the point that he had in mind, as to whether or not it was a legal sentence" (14). The letter from the warden, read into the record (16-19), discussed the question of whether Guglielmelli could be sentenced under 2184a where he had committed the crime before he was sixteen years old, but sentenced after. The warden felt that the age problem would not render a 2184a sentence illegal (18). The Judge gave the letter to Mr. Fuschino who then showed it to the Guglielmelli family, telling them that the defendant could receive a 20 years to life sentence or he could receive a five-year maximum sentence to Elmira under 2184a (21). Although the Judge had told Mr. Fuschino that he did not believe a reformatory sentence could be imposed, and had said that he "didn't think it was a legal sentence" (21), Mr. Fuschino conveyed a different impression to the defendants and their families. He showed them the letter as proof that a reformatory sentence could be imposed, represented that the Judge wanted to help the boys, and offered the letter as proof of the Judge's

attitude. Fuschino said, "You never heard of such a thing, that a judge would go out so far to try to help the boy. . . Here is a letter that he has received showing that such a sentence, if imposed, that the Elmira Reception Center would accept the boy. . . Although there is no promise here, there is a good chance, in view of his good background, he might get such a sentence" (22). Mr. Fuschino also told the petitioner Ciappetta and his family about the possibility of a 2184a sentence (26). Ciappetta, however, was reluctant to plead to murder in the second degree (27). He wanted a lower plea (27), because he was disturbed at the possibility of a 20-year to life sentence. It was only after many discussions among the petitioner, the family, the lawyer and the other defendants, and only after Ciappetta received the lawyer's assurance that a 2184a sentence was possible that the petitioner agreed to plead guilty to second degree murder (29-30).

Frank Ciapetta testified that he was then 17 years old and had never been in trouble before (45). He had refused to plead guilty to murder in the second degree (47) until Mr. Fuschino told him about the warden's letter and "told me about the five year sentence" (46-8). His parents also told him that he might receive a five year maximum sentence since Mr. Fuschino had so advised them (48-50-1). Ciappetta would not have pleaded guilty without the possibility of a five-year maximum sentence to Elmira (48-9).

Bessie Ciappetta the petitioner's mother, testified that

Mr. Fuschino had told her that "all the boys will get five years" (53). Her son was reluctant to plead, and pleaded guilty only "because he thought he will get five years" (54). Mrs. Ciappetta had told her son about the five-year possible sentence since Mr. Fuschino had told her about it (55). One of the other defendants, Giampetrucci, also did not want to take any plea, but the others convinced him to take it because of the five-year sentence (53-4).

Vincent Guglielmelli testified that his mother told him that Mr. Fuschino said that if he pleaded to murder in the second degree he could receive a five-year maximum sentence (32). He was told he could get that sentence since the Judge had received a letter from Elmira "saying it was okay" (32).

Criscenza Guglielmelli, Vincent's mother, testified that Mr. Fuschino had first told her that the child would eventually be turned over to Children's Court (34). However, if he did not go to Children's Court, he would receive a five-year maximum sentence (39). When Fuschino showed her the letter from Elmira, the lawyer said, "this is it; this is what we have been waiting for" (41). Then, Mrs. Guglielmelli testified, "I knew my boy was going to get a sentence of five-year maximum, and I wasn't afraid any more" (41). When he was sentenced to 20 years to life imprisonment, it was "a shock. We were frozen. We never expected that, never" (41).

Andrew C. McCarthy, the assistant district attorney in charge of the prosecution of this case, testified that he

had a conversation with Mrs. Guglielmelli and Mrs. Ciappetta (63-4) and told them that there was a discussion going on between Mr. Fuschino and assistant district attorney Lee concerning the interpretation of Section 2184a (66). He did not, however, tell Mrs. Guglielmelli that her son would receive a five-year maximum sentence (63).

#### Statutes Involved

The relevant statutes of the former Penal Law of the State of New York are:

##### S 2184-a. Reformatory term for male persons

Where a male person between the ages of sixteen and twenty-one years is hereafter adjudicated a juvenile delinquent, or found to be a disorderly person or vagrant, or adjudged a wayward minor or youthful offender, or found guilty of any offense or of a misdemeanor, or of a felony, including crimes punishable with imprisonment for an indeterminate term having a minimum of one day and a maximum of his natural life, but excluding crimes punishable by death or life imprisonment, the trial court may, instead of sentencing him to imprisonment in accordance with the punishment provided by law for the crime or offense for which he was convicted, direct him to be confined in an institution under the jurisdiction of the department of correction without designating the name of such institution, and commit him to the department reception center for classification and transfer in accordance with the provisions of article three-A of the correction law. The term of imprisonment of any person sentenced hereunder shall be known as a reformatory term, and shall be terminated by the board of parole in the executive department, but in the case of any person convicted of a felony, such term shall not exceed five years and in the case of any person convicted for any other offense or for a misdemeanor, the term shall not exceed three years.

Added L.1932, c. 414, § 2; amended L.1950, c. 525, § 20; L.1954, c. 803, § 44, eff. Feb. 1, 1955.

##### S 1048. Punishment for murder in the second degree

Murder in the second degree is punishable by imprisonment under an indeterminate sentence, the minimum of

which shall be not less than twenty years and the maximum of which shall be for the offender's natural life; and any person serving a term of imprisonment for life, under an original sentence for murder in the second degree, on the first day of September, nineteen hundred and seven, shall be deemed to be thereafter serving under such an indeterminate sentence. As amended L.1928, c. 32, eff. July 1, 1928.

POINT I

DUE PROCESS REQUIRES VACATING THE PETITIONER'S GUILTY PLEA SINCE IT WAS NEITHER KNOWINGLY NOR VOLUNTARILY ENTERED

The petitioner Frank Ciappetta is presently serving a sentence of 20 years to life in prison as a result of his plea to murder in the second degree, entered in 1955 when he was 17 years old. That plea, however, was constitutionally defective.

At the time the penalty for murder in the second degree was the mandatory term actually imposed (former Penal Law §1048). Yet the only reason Ciappetta overcame his reluctance to take the plea was because he received assurances from his attorney that he was eligible for and had a good chance to obtain a reformatory term in the Elmira Reception Center for a maximum of five years. Such a term, he was told, could be imposed under former Penal Law §2184a, a statute allowing reformatory sentences for youths between the ages of 16 and 21. In actual fact, however, Section 2184a was on its face inapplicable to second degree murder, since the law specifically excluded crimes punishable by life imprisonment. Thus misled, and with reason to rely on his attorney's false representation, the petitioner

unknowingly invited the mandatory term he had strenuously sought to avoid. Due process therefore requires vacating the plea, since it was made without knowledge of the consequences and was based upon the vision of a sentencing alternative which did not exist.

## I.

It has, of course, always been the law that a plea unknowingly and involuntarily entered violates due process. If the plea is made without a full understanding of the consequences there can be no valid waiver of the important rights forfeited by the plea. As expressed by the Supreme Court in McCarthy v. United States, 394 U.S. 459 (1969):

"A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." [394 U.S. at 466].

Similarly, in Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court held that a plea of guilty must be "intelligent and voluntary." Ignorance or incomprehension does not allow an effective waiver, and full knowledge of the consequences of the plea is a prerequisite to a valid judicial admission of guilt.

While the requirements of McCarthy and Boykin -- that the face of the record must disclose that the plea was entered with knowledge of its consequences -- is not retroactive (see, Halliday v. United States, 394 U.S. 831 (1969); United States ex rel. Rogers v. Adams, 435 F.2d 1372 (2d Cir. 1970)), the due process requirements of actual knowledge and voluntariness are, of course, applicable whenever the plea was entered. United States ex rel. Rogers v. Adams, supra, at 1375; United States v. Mosher, \_\_\_\_ F.2d \_\_\_\_ (2d Cir. Jan. 8, 1974), slip op. 1234; Wade v. Wainwright, 420 F.2d 898 (5th Cir. 1969); Grant v. United States, 451 F.2d 931 (2d Cir. 1971); Korenfeld v. United States, 451 F.2d 770 (2d Cir. 1971); People v. Nettles, 30 N.Y.2d 841 (1972); see also, Jones v. United States, 440 F.2d 466 (2d Cir. 1971); Bye v. United States, 435 F.2d 177 (2d Cir. 1970). In the present case the evidence presented at the 1955 coram nobis hearing affirmatively establishes the petitioner's ignorance of the consequences of his plea at the time he entered it.

In particular, the uncontradicted testimony establishes that Ciappetti was laboring under the false impression that there existed a sentencing alternative which could be granted him, namely, a reformatory term for youths at Elmira for 0-5 years. Moreover, judged by objective standards, the petitioner was reasonably justified in his mistaken belief, since it was formed in reasonable reliance on his attorney's representations. Indeed, not only had his lawyer told him,

his parents, and his co-defendant Guglielmelli and his parents that the boys were eligible for the reformatory term, but the attorney had backed up his arguments by displaying a letter from the warden of the Elmira institution which had been sent to the Judge. The letter opined that such a sentence could be imposed and that the Reception Center would accept the defendants if sentenced under 2184a. Added to this was Mr. Fuschino's own advice that the plea should be taken. What Ciappetta did not know, however, was that, contrary to his lawyer's representations, the Judge felt that a 2184a sentence would be illegal and that the statute itself could not possibly apply to a plea to second degree murder. In other words, Ciappetta had a false view of the consequences of his plea, he was justified in relying on the false view, and he did rely on it to his detriment. As he and his mother testified, the petitioner would not have pleaded were it not for the possibility of the five-year maximum sentence. A plea taken under such circumstances is simply inconsistent with due process of law, as the cases indicate.

Thus, in Bye v. United States, supra, the defendant had been told by his attorney that if he pleaded to a crime carrying a 5-20 year term "he could be paroled in a couple of years" (435 F.2d at 178). In fact, as a narcotics offender, he was ineligible for parole under 26 U.S.C. §7237(d). The Second Circuit held that a hearing was necessary to test the voluntariness and knowledge of the pre-McCarthy, pre-Boykin plea, since Bye's ignorance that he was ineligible for parole "directly

affects the length of time an accused will have to serve in prison." "The danger is that the accused makes his decision to plead guilty underestimating by a factor of three the risk of prolonged mandatory incarceration. If the accused's ineligibility is known to him prior to entering his guilty plea, he may decide not to plead guilty at all in view of the greater perceived risks of lengthy imprisonment." 435 F.2d at 180. Accordingly, if a defendant can show that he was unaware of his ineligibility for parole, and that he would not have pleaded guilty if he had known the true facts, the plea must be vacated no matter when it was entered (United States v. Welton, 439 F.2d 824 (2d Cir. 1971); Korenfeld v. United States, 451 F.2d 770 (2d Cir. 1971)). The present case is comparable, since Ciappetta pleaded under the impression created by his attorney that he was eligible for a five-year maximum reformatory term, while in fact, he was ineligible for such sentence. And he would not have pleaded had he known the real consequences. Indeed, since Ciappetta's ignorance directly affected the length of time he would have to serve in prison, his plea was constitutionally invalid.

Similarly, in Jones v. United States, 440 F.2d 466 (2d Cir. 1971) the court held that knowledge of the maximum sentence was one of the consequences of a valid plea, citing two due process decisions, Wade v. Wainwright, supra, and Tucker v. United States, 409 F.2d 1291, 1295 (5th Cir. 1969)

as authority. Obviously, knowledge of a mandatory minimum is equally a due process requirement, since both are important consequences of a plea (see, People v. Nettles, supra). Here, Ciappetta was completely unaware that he had to receive the mandatory minimum and maximum proscribed for murder in the second degree, instead banking his plea on the "good chance" his attorney said he had for a 0-5 year reformatory term.

Most recently, in United States ex rel. Leeson v. Damon, \_\_\_\_ F.2d \_\_\_\_ (2d Cir. Apr. 1, 1974), slip op. 2483, the Second Circuit granted 2254 relief to a youth who was told by his attorney that his plea to attempt grand larceny in the second degree would expose him to a sentence of 1.3 to 2.6 years in jail. The lawyer, however, overlooked that the defendant's age made him eligible for sentence to Elmira for an indefinite reformatory term of five years, the sentence which was eventually imposed. The court held:

On the merits, this is not the kind of case that apparently the sentencing judge thought it was, that is to say, where a guilty plea was based on an erroneous prediction about sentence by counsel. . . Rather it is a case where the undisputed proof before the trial judge is that the defendant entered his plea in ignorance of what the maximum possible sentence was, believing it to be substantially less than that which the court was authorized to impose and which, indeed, it did impose.

Slip Op. at 2488

Upon the facts in this case, appellant's plea was not knowing and was without an understanding of the law inasmuch as he did not know the maximum possible sentence he might receive. It is thus a

plea entered in ignorance of its direct consequences, and it is therefore invalid.  
Slip Op. at 2489

Since Ciappetta, like Leeson, had no understanding of the law in relation to the facts (slip op. at 2489), and entered his plea "in ignorance of its direct consequences" due process requires vacating his plea in this case.

## II.

In Mosher v. United States, \_\_\_ F.2d \_\_\_ (2d Cir. Jan. 7, 1974) slip op. 1243, a state defendant pleaded guilty in 1964 in reliance upon his lawyer's representation that the Judge had promised a 15-16 sentence. That representation was false, and the Second Circuit held that as a result the plea was not knowingly or voluntarily entered.\* Here, a similar false representation was made by counsel, and was reasonably relied upon by the petitioner when he entered his plea. For throughout the conferences between Mr. Fuschino and the Court, Judge Schulz consistently expressed his belief that a 2184a sentence was illegal and could not be imposed (12, 21, 30).

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\* The Circuit Court in Mosher also held that the plea was invalid because the defendant had been denied effective assistance of counsel. For this ground as it applies to the facts of this case, see Pt. II, infra.

He reiterated his feeling upon receipt of the warden's letter, specifically telling counsel "I don't like it," the letter "was not to the point" of "whether or not it was a legal sentence" (14). Though Mr. Fuschino testified that he personally believed that a 2184a sentence would be lawful, he acknowledged under questioning from the Judge at the hearing that "you [the Judge] had indicated that you believed [that a 2184a sentence could be imposed] was not the fact; you had said you didn't think it was a legal sentence." (21). Yet despite the Court's rather clear expressions, the lawyer totally misrepresented the situation to his clients and their parents.

The letter which the Judge had discarded as irrelevant was presented by the attorney to Mrs. Guglielmelli with the eager assertion, "this is it; this is what we have been waiting for" (41). He never once even hinted to his clients that the Judge felt a reformatory sentence was illegal, but rather argued persuasively "you never heard of such a thing, that a judge would go out so far to try to help the boy. . . there is a good chance, in view of his good background, he might get such a sentence" (22). In ignorance of the true tenor of what the Judge had said, and in reliance on the attorney's false picture of the Judge's attitude, the petitioner and his co-defendant, and both their families, were convinced that there was a "good chance" for a five-year maximum term. In reliance, Caippetta pleaded guilty and, of course, received the mandatory term.

The present case is thus virtually indistinguishable from Mosher. There the lawyer misrepresented a Judge's sentence promise. Here the lawyer misrepresented the Judge's view on the legality of a sentencing alternative, where the viability of the sentencing alternative was crucial to the defendant's choice to plead or stand trial. In both cases the plea was clearly unknowing and involuntary.

#### POINT II

##### THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE TIME HE PLEADED

In Mosher the court also held that the lawyer's misrepresentation to his client denied him the effective assistance of counsel. Slip op. at 1247. The same result follows from the facts here. Not only did petitioner's attorney misrepresent the Judge's view on the legality of a 2184a sentence, thus breaching his duty as counsel to represent his client faithfully, but in a similarly egregious fashion his insistence upon the viability of the sentencing alternative unfortunately fell below the standard expected of counsel. For the attorney did not merely make an erroneous estimate regarding the sentencing alternative, nor could his assertion in this regard be the result of misanalyzing an abstruse or complex legal problem. Rather, the attorney either was not aware or chose to disregard that Section 2184a was on its face inapplicable to a second degree murder plea, since it excluded crimes punishable by life sentences. In either event, the representation accorded was

completely inadequate. Certainly, where a lawyer in effect bases his whole case on one statute, he should at least be under the obligation of knowing and correctly representing to his clients the crystal clear words of that statute. This is a bare minimum of effective assistance of counsel. By convincing the defendants and their families that a plainly unavailable sentencing alternative existed, counsel here failed to exercise a standard of care which must necessarily be a requisite for rendering effective legal representation. Anything less self-evidently turns the proceedings into a mockery.

CONCLUSION

THE WRIT OF HABEAS CORPUS SHOULD BE GRANTED, AND  
THE PETITIONER DISCHARGED FROM CUSTODY.

Respectfully submitted,

ROSNER, FISHER & SCRIBNER  
Attorneys for Petitioner  
401 Broadway  
New York, N.Y. 10013  
(212) 925-8844

Of Counsel:

NANCY ROSNER  
ALAN SCRIBNER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES ex rel. NANCY ROSNER, :  
on behalf of Frank Ciappetta,

Petitioner,

-against-

AFFIDAVIT

WARDEN, Sing Sing Prison,  
Ossining, New York,

:-----X

Respondent.

STATE OF NEW YORK )  
: SS.  
COUNTY OF NEW YORK )

ARLENE R. SILVERMAN, being duly sworn, deposes and  
says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for respondent herein. I submit this affidavit in opposition to petitioner's application for a writ of habeas corpus.

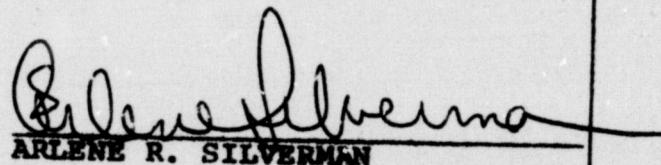
Petitioner is currently detained at the Ossining Correctional Facility, Ossining, New York, where he is serving a term of twenty years to life upon his conviction for murder in the second degree in the Bronx County Court on June 24, 1955.

On March 15, 1968 petitioner was paroled from state prison. On December 12, 1972, petitioner was arrested for criminal possession of a dangerous drug (8 grains of cocaine). He was declared delinquent on February 9, 1973, as a result of this arrest and was returned to state prison. He was subsequently indicted in Bronx County, pleaded guilty to attempted

felonious possession of a dangerous drug in the fourth degree and on July 10, 1973 he was sentenced to a one year term. At the time of petitioner's arrest, evidence was also uncovered relating to a possible federal gun charge.

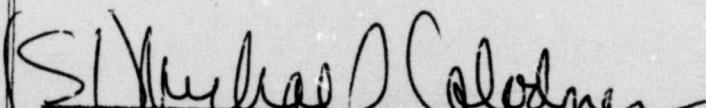
Deponent has been informed by the office of the United States Attorney for the Southern District of New York that petitioner has been indicted in this Court for the crimes of (1) making a false statement in connection with the purchase of a firearm in violation of Title 18 U.S.C. 922(a)(6) and (2), being a person who had been convicted of a felony and possessing a gun in violation of Title 18 Appendix U.S.C. 1202(a)(1).

Apparently, in view of the charges in this federal indictment which are allegedly based in part on the Bronx County conviction, petitioner has now launched an attack on his murder conviction in the Bronx County Court on the ground that his guilty plea was invalid. However, for the reasons set forth in the accompanying memorandum of law, petitioner's claim is without merit and his application should be denied and the petition dismissed.



ARLENE R. SILVERMAN

Sworn to before me this  
1st day of May, 1974



Michael J. Colodner  
Assistant Attorney General  
of the State of New York

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES ex rel. NANCY ROSNER, :  
on behalf of Frank Ciappetta,

Petitioner, :

-against- :

WARDEN, Sing Sing Prison,  
Ossining, New York, :

Respondent. :

-----X

RESPONDENT'S MEMORANDUM OF LAW

Statement

This memorandum is submitted in opposition to  
petitioner's application for a writ of habeas corpus.

Background

On June 15, 1954, defendant Frank Ciappetta, together  
with Vincent Guglielmelli, Philip Bonanno, Jerry Santaniello  
and Frank Giampetrucci, were jointly indicted by the Grand  
Jury of Bronx County for the crime of murder in the first  
degree.

At about noon on June 1, 1954, the aforementioned Bonanno, Santaniello and Giampetrucci, and about three or four other members of the "Red Wings", a teenage gang from 116th Street and Second Avenue, New York County, were at Orchard Beach. They became involved in an argument with another teenage group known as the "Fordham Baldies".\*

Defendants Bonanno, Santielo and Giampetrucci sought revenge for the insults they had received at Orchard Beach. Upon their return to Harlem, they sought out the other two defendants, Frank Ciappetta and Vincent Guglielmelli. The five defendants thereupon returned in a car, owned and operated by Giampetrucci, to Orchard Beach in order to hunt for the members of the "Baldies". Ciappetta and Guglielmelli each had with them fully loaded automatic pistols.

Unable to find the "Baldies" at Orchard Beach, the defendants drove to a candy store at 2481 Belmont Avenue, where, they had been informed, the "Baldies" "hung out". They arrived there at about 4:55 p.m., on June 1, 1954. Angelo DiVincenzo and Bernard Caleo were seated on a stoop in front of the candy store. Ernest Monturro was seated inside the store drinking a soda.

\* Copy of trial minutes are submitted herewith.

In response to an inquiry as to whether they were the "Fordham Baldies", DiVincenzo, Caleo and Monturro walked towards the double parked automobile. When the three reached the curb some of the occupants of Giampetrucci's car said, "You called us punks". Immediately two guns were produced, and about six shots were fired. The defendants then sped away in the car.

Monturro, who was not a member of the Baldies, died a few minutes later from a gunshot wound. Caleo received a gunshot wound which necessitated the amputation of his right leg above the knee. DiVincenzo was struck by a bullet which pierced through his left arm.

Within a week the police apprehended the defendants. All five of them made statements to the police and to an Assistant District Attorney. These statements substantially admitted the foregoing facts. Ciapetta and Guglielmelli stated that they had used the guns in the shooting.

According to the report of the ballistics experts, the fatal bullet had been fired by defendant Ciapetta. The bullet that wounded Caleo, requiring the amputation of his leg, had been fired by defendant Guglielmelli.

All five defendants pleaded not guilty and proceeded to trial. After the trial had been in progress for two weeks, Ciappetta, as well as the other defendants, withdrew his plea of not guilty. Ciappetta was permitted to dispose of the indictment by entering a plea of guilty to the crime of murder in the second degree. This plea was entered on May 2, 1955. On June 24, 1955, defendant was sentenced to a term of from 20 <sup>/years</sup> to a maximum of his natural life. No appeal was ever taken from this conviction.

On August 31, 1955, defendant brought on a motion, in the nature of a writ of error coram nobis, seeking to vacate the judgement of conviction. The basic ground asserted upon this application was that defendant had entered his plea of guilty based upon an official promise that he would receive a reformatory sentence having a maximum of 5 years. A hearing was held with reference to this application on November 4, 1955.

Shortly prior to the time that Ciappetta made this application, his co-defendant, Guglielmelli, made a similar application. A hearing was conducted on his application together with Ciappetta's.

At the aforesaid hearing, full inquiry was made into all of the circumstances surrounding the pleas entered by both defendants Ciappetta and Guglielmelli. The testimony of their retained trial counsel, Stephen A. Fuschino, Esq., clearly established that the only information he had ever conveyed to either defendant, or their respective families, was that defendants had the opportunity to dispose of the indictment by pleading guilty to the crime of murder in the second degree, and that in his opinion under such a plea the possibility existed that one or both defendants might receive a reformatory sentence having a maximum of 5 years. He also made them aware of the possibility that they could receive a sentence of 20 years to life (S.M. pp. 3-29).\*

The aforesaid testimony of Mr. Fuschino also denied that he had ever conveyed any express or implied communication to the effect that the trial judge was inclined to sentence defendants to a reformatory term, if they would plead guilty to murder in the second degree. The testimony of Fuschino clarifies that a reformatory sentence was at all times discussed only as a possibility which in Mr. Fuschino's opinion existed.

\* Page references are to minutes of Coram Nobis Hearing, unless otherwise indicated.

The significance of a letter written to Judge Schulz by the Director of the Elmira Reception Center was fully clarified. This letter had been sent to the Judge as a result of a letter sent to the Director by Assistant District Attorney Lee, inquiring as to the legality of a sentence under Section 2184-a, Penal Law, upon a conviction for murder in the second degree. Mr. Lee had sent this letter at the behest of Mr. Fuschino for the purpose of satisfying Fuschino's desire to learn if such a sentence was legal.

The response of the Director was equivocal. Judge Schulz showed counsel the letter and indicated to him that he was not satisfied that such a sentence was legal. Counsel for defendants was trying to convince the Court to consider rendering such a sentence.

Mr. Fuschino had the letter during a recess. In discussing the possibility that one of the defendants might get a reformatory sentence if convicted of murder in the second degree, counsel showed the letter to Guglielmelli's parents. The letter was never shown to Ciapetta or his parents, although Ciapetta alleges he later heard of its existence.

Fuschino's part in the pre-pleading proceedings is best summarized by the following testimony which he gave at the coram nobis hearing (S.M. pp. 26-27):

"Q. Do you remember whether or not at any time after the trial commenced and in the various discussions with the Ciappettas and the Guglielmellis, that you indicated Mrs. and Mr. Ciapetta or the defendant Frank Ciapetta that there was a possibility of his being sent to the Elmira Reception Center?

A. That, in other words, I have reference strictly now to Ciapetta.

A. Yes.

Q. He also was informed that there was a possibility of being sent to Elmira?

A. He could get 20 years to life to [sic] be sent to Elmira.

The Court: You stated that as your opinion?

The Witness: Yes; I had told them I felt, in my opinion, taking everything into consideration, that there might be a possibility they would receive this sentence." (Emphasis added.)

The testimony of Ciapetta at the coram nobis hearing clearly refutes his present claim. Defendant's testimony unequivocally shows that at the time he decided to enter a plea of guilty to the crime of murder in the second degree, he was fully cognizant of the fact that he was subject to receiving a sentence of 20 years to life, and that no more than a

possibility existed that he might receive a reformatory sentence having a maximum of 5 years.

At the hearing held with reference to defendant's claim, Ciappetta testified, upon direct examination, as follows (S.M. p. 48):

"Q. Did you talk to your parents about it?

A. Yes, sir.

Q. And, well, what did your parents, your mother and father tell you regarding the taking of the plea or any recommendations they had?

A. Well, they told me, they says -- no, it was after I took the plea, they said that, 'You might get the five years,' something like that." (Emphasis supplied)

Defendant's mother, Bessie Ciappetta, testified at the hearing as follows (S.M. p. 54):

"Q. I mean, did you have to talk him into taking the plea?

A. No; I left it up to him, and he, and he took it."

Based upon the testimony adduced at the 1955 hearing, the County Court denied the application of both Guglielmelli and Ciappetta. The Court (petitioner's Exhibit D) found that the petitioner pleaded guilty on the representation that there was only a possibility of his receiving a reformatory sentence. The Court held that a prediction by counsel as to the length of imprisonment, even if erroneous, formed no basis for coram nobis relief.

On April 18, 1960, defendant brought on a second motion, in the nature of a writ of error coram nobis, seeking to vacate the judgment of conviction rendered against him. He again based his application on an assertion that "he believed he would be sentenced under the provisions of Section 2184-a of the Penal Law." Defendant did not offer any new fact or evidence with reference to this claim.\*

Defendant's motion was denied on April 18, 1960 (petitioner's Exhibit E). Judge Schulz found that petitioner had already been accorded a hearing on his allegations and that application had been denied on December 6, 1955. No appeal was taken from that order. The Court held that in view thereof, there was no need for a second hearing on an issue already disposed of, and the Court, thus, declined to review the merits of petitioner's second application.

POINT I

PETITIONER HAS FAILED TO PRESERVE HIS CURRENT ATTACK ON HIS PLEA OF GUILTY TO MURDER IN THE SECOND DEGREE FOR FEDERAL HABEAS CORPUS REVIEW.

Petitioner first raised his claim that his plea of guilty was unknowingly and involuntarily entered because of

\* Ciappetta advanced a further ground for his 1960 application, an allegation that his rights were violated in that his attorney had not given Ciappetta's case counsel's "undivided" attention. This claim is based solely upon the fact that defendant's attorney also represented his co-defendant Guglielmelli. This claim is not urged here.

alleged misrepresentations of his attorney as to the sentence he could receive upon his plea of guilty to murder in the second degree in a coram nobis application the Bronx County Court in 1955. After a hearing on December 6, 1955, Judge Schulz denied his application holding that an erroneous sentence estimate by counsel does not render a plea involuntary. No appeal was taken from that order.

Thereafter in 1960, a second coram nobis application was initiated in the Bronx County Court raising this same claim. On April 19, 1960 Judge Schulz held that petitioner had already had a hearing on the claim which was denied on December 6, 1955 that no appeal was prosecuted from that order and that under New York law, there is no requirement of a second hearing on an issue previously considered. Petitioner's application was denied.

Petitioner did not appeal the order of December 6, 1955. Judge Schulz declined to review this claim on its merits when petitioner attempted to raise it for the second time. This order was affirmed by the Appellate Division on October 23, 1962. Petitioner failed to avail himself of the procedures provided by New York law for reviewing his claim. The matter was never preserved for review by the Appellate Division of the New York Supreme Court and, accordingly, petitioner has failed to preserve his claim for federal habeas corpus relief. U.S. ex rel. Schaedel v. Follette, 447 F. 2d 1297 (2d Cir. 1971); U.S. ex rel. Molinas v. Mancusi, 370 F. 2d 601 (2d Cir. 1967).

Moreover, petitioner fails to allege that he sought leave to appeal to the N.Y. Court of Appeals and for this additional reason, his application must be denied. 28 U.S.C. 2254 (b).

POINT II

AN ERRONEOUS SENTENCE PREDICTION  
BY COUNSEL DOES NOT RENDER A  
GUILTY PLEA INVALID.

Faced with a possible federal gun charge conviction in this Court, based, in part, on a felony conviction in Bronx County, petitioner, at this eleventh hour, has resurrected an attack on that Bronx County conviction in 1955 for murder in the second degree. Petitioner is raising a twenty year old claim, in this Court for the first time, that his plea was unknowingly and involuntarily entered because his attorney who had fully apprised him that he faced a twenty year to life term on his plea to the murder charge also expressed his opinion that there was a possibility that petitioner could receive a five year reformatory term pursuant to the then newly revised former New York Penal Law § 2184-a.\*

However, contrary to petitioner's claims here, the record clearly indicates that petitioner fully appreciated that his plea to murder in the second degree exposed him to the twenty year to life term and that far from pleading in the expectation of receiving a five year term, petitioner pleaded guilty because he had confessed to the unprovoked and pre-meditated murder of Ernest Monturro and his participation in

\* Petitioner does not dispute in this Court that he was informed that his plea to murder in the second degree exposed him to a penalty of 20 years to life. Moreover, after a full hearing in the New York Courts Judge Schulz found that the five year term was only mentioned as a sentence possibility by petitioner's attorney. This finding is presumptively correct here. 28 U.S.C. 2254(d)

the attack at the candy store\* and he expressly wished to avoid the death penalty he faced upon conviction after trial of murder in the first degree.

Petitioner's claim that he expected the five year term is belied by the circumstances surrounding the plea. Thus, after the offer of murder in the second degree, petitioner's trial counsel, nonetheless, attempted to negotiate for a further reduction of the charge to manslaughter in the first degree (9-10). If petitioner were, in fact, to be sentenced to the five year term, such a further reduction would have been unnecessary since petitioner could receive no further sentence benefit by such a move.

And perhaps even more significantly, petitioner and his co-defendant proceeded to trial on the indictment and did not even accept the murder in the second degree offer until well after the trial had begun, the jury having been selected and the People having called several of their witnesses. In short, petitioner was obviously reluctant to take the plea, appreciating the severity of the sentence he faced, and it was only when the trial began and petitioner realized that it was twenty to life or possible death and that the District Attorney was holding firm and not offering any lesser plea that he finally reached his decision to plead guilty.

\* Stenographic statement of petitioner's admissions to the District Attorney are submitted herewith as Exhibit 1.

Moreover, Ciappetta, himself, at the *coram nobis* hearing implicitly confirmed these reasons for his plea stating that at the time he entered his plea, he harbored no more than a hope that the possibility of a reformatory sentence would be realized (48).

The fact that Mr. Fuschino expressed his opinion that a five year reformatory sentence was a possibility does not void petitioner's plea. Mr. Fuschino never promised petitioner any five year term, he simply expressed his opinion that petitioner could get twenty years to life or a possible reformatory sentence of five years. In short, counsel was rendering that type of advice which was his job to do. It must be remembered that in 1955 former New York Penal Law § 1284-a had just been amended to provide that the reformatory term was applicable to male persons between the ages of sixteen and twenty-one years of age convicted of a felony "including crimes punishable with imprisonment for an indeterminate term having a minimum of one day and a maximum of his natural life..." Under these circumstances, Mr. Fuschino consistent with his obligation to his client was arguing for an interpretation of the new statute so as to include his clients. As it eventually developed, Judge Schulz ultimately held that, as a matter of law, the reformatory term was unavailable. However, such circumstance does not render petitioner's plea invalid.

In McMann v. Richardson, 397 U.S. 759, 774, the Supreme Court stated:

"It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes that risk of ordinary error in either his or his attorney's assessment of the law and facts . . . he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not after all, a knowing and intelligent act." (Emphasis supplied)

In United States v. Horton, 334 F. 2d 153 (2d Cir. 1964), the defendant sought to invalidate his plea on the ground that defense counsel had represented that the Assistant United States Attorney would recommend a sentence shorter than the possible maximum, although the established rule in this Circuit is that the federal prosecutor may not make a sentence recommendation. This Court held that notwithstanding this erroneous sentence advice by defense counsel, this was insufficient to entitle the petitioner to withdraw his plea.

"It has recently and we think correctly said that erroneous advice by defense counsel as to sentence does not support attack under § 2255 unless it amounts to ineffective assistance of counsel of such kind

as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice." United States v. Horton, supra, 153.

In United States ex rel. Scott v. Mancusi, 429 F. 2d 104, the petitioner sought to invalidate his plea on the grounds that defense counsel erroneously informed him prior to his plea that it could be withdrawn at any time. Defense counsel erred since the plea was subject to withdrawal only upon approval of the trial court. This Court stated:

"Although it is surprising that counsel would not be aware of the governing New York Statute, his conduct was not such as would 'shock the conscience of the Court and make the proceedings a farce and mockery of justice'. . . See also, United States ex rel. Maselli v. Reincke, 383 F. 2d 129, 132 (2d Cir. 1967) where it is stated that for there to be a lack of compliance with the fundamental fairness essential to due process counsel's representation must be so 'horribly inept as to amount to a breach of his legal duty faithfully to represent his client's interest...' The present case is a long way from meeting the tests set out above."

Finally and most recently, this Court in LaFay v. Fritz, 455 F. 2d 297 (2d Cir., 1972), cert. den. 407 U.S. 923 (1972), has reaffirmed that an erroneous sentence estimate by defense counsel does not render a plea involuntary.

Petitioner's memorandum of law in this Court virtually ignores this authority in an attempt to bring himself within the holdings of United States ex rel. Leeson v. Damon, \_\_\_\_ F. 2d \_\_\_, Slip Sh. Op. 2483 (2d Cir. April 1, 1974); Mosher v. United States, \_\_\_\_ F. 2d \_\_\_, Slip Sh. Op. (2d Cir. 1974); and Bye v. United States, 435 F. 2d 177 (2d Cir. 1970).

However, contrary to the undisputed fact here that petitioner knew he faced a twenty year to life term, in both Mosher and Leeson, the Second Circuit found that the petitioners had no knowledge of the possible maximum consequences each in actuality faced and the Second Circuit accordingly held that the representation accorded Leeson and Mosher fell below constitutional standards. In Bye the Second Circuit simply remanded for a determination of whether petitioner was informed that he was ineligible for parole. Here petitioner was fully aware that he faced the twenty year to life term.

In short, petitioner pleaded guilty to murder in the second degree in order to avoid a conviction for murder in the first degree and the death penalty. He fully appreciated that he was exposing himself to a term of twenty years to life, he made a considered and reasonable decision to plead in view of the strength of the People's case, and his attorney's attempt to have the Court impose a five year reformatory term did not

render his assistance shocking so as to invalidate the plea but rather indicated a proper aim by trial counsel to minimize the penalty his client faced.

Finally, it should be pointed out that petitioner's claim, even if meritorious, would not invalidate his plea. Rather, the state courts have the option of giving petitioner the sentence he thought he had bargained for or permitting him to withdraw his plea of guilty and standing trial on the indictment. Santobello v. New York, 404 U.S. 257, 263 (1971); Mosher v. LaVallee, \_\_\_\_ F. 2d\_\_\_\_\_, Slip Sh. Op. 58 (2d Cir., Jan. 8, 1974). Petitioner here did not institute this federal habeas corpus application until he was faced with a federal criminal indictment. Twenty years have passed since the crime was committed, and it may be difficult, if not impossible, to retry petitioner and in these circumstances, the State court has the option of retrying or simply resentencing him.

CONCLUSION

PETITIONER'S APPLICATION FOR A  
WRIT OF HABEAS CORPUS SHOULD  
BE DENIED.

Dated: New York, New York  
May 1, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Respondent

ARLENE R. SILVERMAN  
Assistant Attorney General  
of Counsel

AMENDED PETITION

A 44

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
-----X

UNITED STATES ex rel. NANCY ROSNER,  
on behalf of FRANK CIAPPETTA,

74 Civ. 1643

Petitioner,

-against-

AMENDED PETITION

WARDEN, Sing Sing Prison, Ossining,  
New York,

Respondent.

-----X

TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK:

1. Your petitioner is the attorney for Frank  
Ciappetta and has been authorized by him to make this amended  
petition for a writ of habeas corpus on his behalf.

2. The petition for a writ of habeas corpus was filed  
on April 11, 1974 and was assigned, as a case related to 74 Cr.  
361, to Honorable Constance B. Motley.

3. Petitioner realleges and incorporates herein all of  
paragraphs 1 through 8 of the original petition, except for that  
part of paragraph 3 described below.

4. In paragraph 3 of the petition, it was stated  
that after the coram nobis application was denied on December 6,  
1955, "no appeal from the order denying the application was ever  
perfected." However, upon rechecking the files of this case, the  
above statement turned out to be inaccurate. Ciappetta in fact  
filed a notice of appeal on January 13, 1956. (A copy of the  
notice of appeal is annexed as Exhibit "A"). Subsequently, an  
agreement was made with the District Attorney, Bronx County, to  
the effect that the appeal in Ciappetta's case would be determined  
by the decision on appeal in the case of his co-defendant, Vincent

ROSNER, FISHER AND SCRIBNER

Guglielmelli. This agreement was expressed in affidavits filed by Ciappetta's attorney and submitted to the Appellate Division on November 12, 1956 (Exhibit "B") and January 4, 1957 (Exhibit "C"). As stated in the November 12 affidavit:

"Your deponent is of the opinion that the facts, circumstances and law are identical in both appeals and your deponent has discussed this matter with the Appeals Bureau of the District Attorney's Office: Bronx County and it has been agreed by and between us that the decision of the case of VINCENT GUGLIELMELLI shall be binding upon the Appellant herein." (Emphasis supplied)

5. Subsequently, the order of the County Court denying coram nobis was affirmed. People v. Guglielmelli, 170 N.Y.S.2d 986 (1st Dept. 1958). Additionally, I have been informed by Mr. Jack Gary, Clerk of the Court of Appeals of the State of New York, that leave to appeal to the Court of Appeals by Guglielmelli was denied by Judge Stanley H. Fuld on March 13, 1958.

6. Since it was agreed between the parties that Ciappetta's appellate remedies would inhere in the case of his co-defendant, Vincent Guglielmelli, and since all state appellate remedies were properly exhausted, the Appellate Division having affirmed and the Court of Appeals having denied leave to appeal, petitioner has properly preserved his claim for federal habeas corpus review. (See reply memorandum of law attached and made a part hereof).

WHEREFORE, petitioner prays that an order be entered granting the writ of habeas corpus pursuant to 28 U.S.C. §2254, and further discharging the petitioner from custody, and that the Court grant any such other and further relief as to this Court may seem just and proper.

James Ror  
Petitioner

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

A 46

NANCY ROSNER, being duly sworn, deposes and says that she is the petitioner in the within action; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes them to be true.

Nancy Rosner  
Nancy Rosner

Sworn to before me this

17 day of May, 1974.

Eunice Burnett

EUNICE BURNETT  
Notary Public, State of New York  
No. 31-5534630  
Qualified in New York County  
Commission Expires March 30, 1976

COUNTY COURT  
COUNTY OF BRONX

A 47

-----X  
THE PEOPLE OF THE STATE OF  
NEW YORK

against

FRANK CIAPETTA

Defendant

-----X  
SIRS:

PLEASE TAKE NOTICE, that the defendant hereby appeals to the Appellate Division of the Supreme Court, First Department, from an Order of Hon. EUGENE G. SCHULZ, entered in the Office of the Clerk of the County Court, Bronx County, on or about the 6th day of December 1955, denying defendant's motion to vacate judgment of conviction herein and from each and every part of said order and from the whole thereof.

Dated, New York, January 13, 1956.

Yours, etc.

FREDERICK J. MILLER  
Attorney for Defendant  
320 Broadway  
New York 7, N.Y.

TO, Hon. Daniel V. Sullivan  
District Attorney's Office  
851 Grand Concourse  
Bronx, New York

Clerk of County Court  
851 Grand Concourse  
Bronx, New York

EXHIBIT "A"

NEW YORK SUPREME COURT  
APPELLATE DIVISION : FIRST DEPARTMENT

----- X  
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

FRANK CIAIETTA,

Defendant-Appellant.

----- X  
State of New York )  
(County of New York) case:

FREDERICK J. MILLER, being duly sworn, deposes and says:

That I am the attorney for the Appellant and am fully familiar with all the facts and circumstances herein.

That the father of the Appellant passed away some time in the Spring of 1956 shortly after your deponent filed the Notice of Appeal, and the family is without funds of any sort whatsoever, however, your deponent will continue with the appeal without receiving a fee.

There is a co-defendant of the Appellant, one VINCENT GUICCIARDINI, who is represented by JACOB W. FRIEDMAN, Esq., 170 Broadway, New York City, who is appealing from the same order and it is my understanding that the argument of that appeal is on the calendar for the January 1957 Term of this Court.

Your deponent is of the opinion that the facts, circumstances and law are identical in both appeals and your deponent has discussed this matter with the Appeals Bureau of the District Attorney's Office, Bronx County and it has been agreed by and between us that the decision of the case of VINCENT GUICCIARDINI shall be binding upon the Appellant herein.

ONLY COPY AVAILABLE

WHEREFORE, deponent respectfully prays that the time of the Appellant be enlarged, and this appeal be set down for a hearing at the same time as the case of VINCENT GUGLIELLI.

Sworn to before me this

12<sup>th</sup> day of November, 1956

Conrad



ONLY COPY AVAILABLE

NEW YORK SUPREME COURT  
APPELLATE DIVISION : FIRST DEPARTMENT

----- X  
THE PEOPLE OF THE STATE OF NEW YORK.

Respondent.

-against-

FRANK CIATTETTA.

Defendant-Appellant.

----- X  
S. I. R.:

PLEASE TAKE NOTICE, that upon the annexed affidavit of FREDERICK J. MILLER, sworn to the 4th day of January, 1957, and upon the notice of appeal herein, a copy of which is annexed hereto, and upon all the proceedings heretofore had herein, the undersigned will move this Court at the Court house thereof, 25th Street & Madison Avenue, Borough of Manhattan, City of New York, on the 15th day of January, 1957, at 1 o'clock in the afternoon of that day, or soon as counsel can be heard, for an order enlarging the time of the defendant-appellant in the above entitled action to perfect his appeal and bring the same on for argument until the April, 1957, Term of the Appellate Division, First Judicial Department, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York  
January 4th, 1957

Yours, etc.,

FREDERICK J. MILLER  
Attorney for Defendant-Appellant  
320 Broadway  
New York 7, New York

TO: HON. DANIEL V. SULLIVAN  
District Attorney, Bronx County  
Attorney for Respondent  
County Court House  
Bronx, New York

NEW YORK SUPREME COURT  
APPELLATE DIVISION : FIRST DEPARTMENT

X

THE PEOPLE OF THE STATE OF NEW YORK.

Respondent.

-against-

FRANK CIAPETTA.

Defendant-Appellant.

X

State of New York )  
County of New York) ss:

FREDERICK J. MILLER, being duly sworn, deposes and  
says:

I am the attorney for defendant-appellant, and I am  
familiar with the prior proceedings and submit this affidavit  
in support of defendant-appellant's motion for enlargement of  
time to argue appeal and for other appropriate relief.

On or about January 13th, 1956, defendant herein  
appealed from an order of the HON. EUGENE G. SCHULZ, entered  
in the office of the Clerk of the County Court, Bronx County,  
on December 6th, 1955, denying his motion to vacate a judg-  
ment convicting him of the crime of murder in the second de-  
gree and sentencing him for a period of from 20 years to life.  
A copy of the notice of appeal is hereto annexed and marked  
Exhibit A.

I have communicated and had many conversations with  
Jacob W. Friedman, Esq., attorney for Vincent Guglielmelli,  
defendant-appellant, who is appealing from the same order and  
it is my understanding that the argument of Guglielmelli's  
appeal was to be noticed for the January, 1957, Term of this  
Court.

Your defendant is of the opinion that the facts, cir-  
cumstances and law are identical in both appeals and I have  
discussed this matter with the Appeals Bureau of the District  
Attorney's Office, Bronx County and it has been agreed by and

between us that the decision of the case of Vincent Gugliel-melli shall be binding upon the appellant herein. I was also informed by the Appeals Bureau that Mr. Friedman has not as yet perfected his appeal for the January, 1957. Term. That the time within which to perfect and argue this appeal has expired, the expiration date being the 2nd day of January, 1957. That the delay has not been intentional or due to lack of diligence, as I intended to rely upon Mr. Friedman to effectuate this appeal which is taken in good faith, and rely upon the outcome of that decision as the one binding on the appellant herein. That the people are not prejudiced by the delay inasmuch as defendant-appellant is presently serving the prison sentence imposed upon him.

I have not received any fee for the handling of this appeal, and am rendering this service without remuneration.

WHEREFORE, it is respectfully prayed that the defendant-appellant's time within which to perfect his appeal be enlarged until the April, 1957, Term of this Court, or to the same time when the case of VINCENT GUGLIELMELLI will be heard for argument.

Sworn to before me this  
4th day of January, 1957

ARTHUR SIEGEL  
Notary Public, State of New York  
No. 03-3657710  
Qualified in Bronx County  
Commission Expires March 30, 1957

 ARTHUR J. SIEGEL

**AFFIDAVIT OF ARLENE R. SILVERMAN**

A 53

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES ex rel. NANCY ROSNER,  
on behalf of FRANK CIAPPETTA.

**Petitioner,**

--against--

WARDEN, Sing Sing Prison, Ossining, New York,

**AFFIDAVIT**

74 Civ. 1643

**Respondent.**

- 8 -

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) SS.

ARLENE R. SILVERMAN, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for respondent herein. I submit this affidavit in opposition to petitioner's amended application for a writ of habeas corpus.

Petitioner has submitted an amended petition in this Court in an attempt to demonstrate that he did, in fact, appeal the order of December 6, 1955 in the Supreme Court, Bronx County which denied his application for a writ of error coram nobis.

However, deponent has examined the records in the Appellate Division, First Department, and contrary to the facts urged here, petitioner never appealed the order of December 6, 1955 and, in fact, on May 16, 1957 his appeal was dismissed for

lack of prosecution. Insofar as petitioner requested to join his co-defendant's appeal, the Appellate Division treated this as a request for an extension. When no brief was filed, the appeal was dismissed.

Deponent has annexed a copy of the Appellate Division, First Department index card which reflects all dispositions on petitioner's appeal, the original of which is on file with the Appellate Division. Additionally, deponent has annexed a copy of the index card relating to petitioner's co-defendant, Vincent Guglielmelli which indicates that, unlike petitioner's, Guglielmelli's appeal was perfected and the order of the Bronx Supreme Court was affirmed on February 11, 1958.

Finally, deponent has submitted herewith the brief of Vincent Guglielmelli on appeal. Guglielmelli's brief makes no mention of petitioner's knowledge or understanding as to the sentence petitioner could receive upon his plea and argues only from the standpoint of Guglielmelli's own knowledge and the conversations of Guglielmelli's parents with Mr. Fuschino. In this posture, it is impossible for Ciappetta to argue that Guglielmelli's appeal satisfied the exhausted requirement of 28 U.S.C. 2254(d).

Petitioner in his reply argues that since Ciappetta has already served five years, vacature of the judgment is the only remedy available upon his application. However, such an argument is contrary to the recent holding of the United States Court of Appeals on reargument in United States ex rel. Leeson v. Damon, (annexed hereto) in which the Second Circuit specifically leaves the decision whether to vacate or remand to the State Court for resentencing

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to the District Court. Moreover whether New York State can impose a five year reformatory sentence and, in effect, effectuate petitioner's argument here is a matter of New York law, best left to the New York Courts in this instance.

WHEREFORE, it is respectfully requested that petitioner's application be denied.

ARLENE R. SILVERMAN

Sworn to before me this  
11th day of June, 1974

Assistant Attorney General  
of the State of New York

Ciapetta, Frank

County Court, Bronx County.

Order entered December 6, 1955 denying motion to  
vacate judgment of conviction.

Notice of appeal filed January 16, 1956.

Copy received in this office January 19, 1956.

Nov. 29, 1956 - Dismissing appeal unless perfected for  
January 1957 term.

# Jan 24, 1957 - Enlarging time to file to May, 1957 T  
term

May 16, 1957 - Dismissed

Guglielmelli, Vincent.

County Court, Bronx County.

Order entered December 6, 1955, denying motion to vacate judgment of conviction.

Notice of appeal filed December 20, 1955.

Copy received in this office December 21, 1955. March 22, 1956 - Dispensing with printing and enlarging time to September 1956 term.

Sept. 27, 1956 - Enlarging time to November 1956

May 23, 1957-Dismissed unless record and points are filed for the Sept. 1957 term

Oct. 29, 1957- Granting to be heard on original record and enlarging time to the April 1958 term.

Nov. 15, 1957- Order of Oct. 29th 1957 vacated and time enlarged to the Jan 1958 term

Feb. 11, 1958- Affirmance

Nov. 28, 1958- Denial by U.S. Supreme Court for writ of  
of certiorari.

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

RECEIVED  
MAY 20 1974  
U. S. COURT OF APPEALS  
SECOND CIRCUIT

A 58

At a stated term of the United States Court of Appeals,  
in and for the Second Circuit, held at the United States  
Court House, in the City of New York, on the 13th day  
of May, one thousand nine hundred and seventy-four.

-----  
United States ex rel. Sheldon Leeson,  
Appellant,

v.

No. 73-2597

Daniel E. Damon, Superintendent of  
Elmira Reformatory, Appellee.

-----  
The petition for rehearing filed by respondent-appellee  
is hereby granted, and the paragraph at slip op. 2490  
commencing "Appellant is aware" is hereby stricken and the  
following paragraph is inserted in lieu thereof:

We leave to the district court on remand the  
task of fashioning relief appropriate under all of  
the facts and circumstances. Granting the writ would,  
of course, permit appellant to withdraw his plea of  
guilty and to plead not guilty, but the State would  
presumably be able to bring him to trial on the offense  
charged, even though he has already served time in the  
Elmira Reformatory therefor. Alternatively, this may  
be another case like Mosher v. Lavallee, No. 73-1354  
(2d Cir. Jan. 8, 1974), slip op. 1243, where the  
district court might grant the option of requiring  
that appellant be given the sentence he thought was  
the maximum, 1.3-2.6 years' imprisonment. A hearing  
may be appropriate to make this determination.

*Paul D. Bays*  
I would grant the application for rehearing and reverse  
the judgment.  
*Deuter A. Handorf*

*J. G. A.*  
U. S. Circuit Judges

MAY 13 1974

6/20/74 Served by mail by Ego. <sup>At my Attorney's office</sup>  
CB - notary

A 59

REPLY AFFIDAVIT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES ex rel. Nancy Rosner, on  
behalf of FRANK CIAPPETTA,

74 Civ. 1643 (CBM)

Petitioner,

REPLY AFFIDAVIT

v.

WARDEN, Sing Sing Prison, Ossining,  
New York,

Respondent.

-----X

STATE OF NEW YORK ) ss.:  
COUNTY OF NEW YORK )

ALAN SCRIBNER, being duly sworn, deposes and says:

I am a member of the firm of Rosner, Fisher & Scribner  
and make this affidavit in response to the affidavit of the  
Attorney General submitted in response to the amended petition for  
a writ of habeas corpus.

Respondent argues that the petitioner did not exhaust  
state remedies because his appeal from the order denying coram  
nobis was dismissed by the Appellate Division on May 16, 1967.

As shown in the amended petition, there was an agree-  
ment between counsel for Ciappetta and the Bronx County District  
Attorney's office that the outcome of Ciappetta's case would  
depend upon the appeal perfected in the case of his co-defendant,  
Vincent Guglielmelli. Guglielmelli did exhaust all state remedies,  
and even petitioned the Supreme Court of the United States for  
certiorari, which petition was denied. Guglielmelli v. New York,  
258 U.S. 899 (1958).

The fact that Ciappetta did not file a brief in the  
Appellate Division, and that his appeal was technically dismissed,  
has no effect upon the preservation of his points or exhaustion of

state remedies. The District Attorney, having agreed that Guglielmelli would fight the case on behalf of Ciappetta, is bound to keep his promise (see Santobello v. New York, 404 U.S. 257 (1971), and the New York State authorities should be estopped from raising a claim of failure to exhaust state remedies because of the agreement. Indeed, federal courts have often recognized that prosecutorial consents to appeal may dispense with regular technical procedures which would have been applicable if there had been no consent. E.g., United States v. Doyle, 348 F.2d 715, 719 (2d Cir. 1965); United States v. Mann, 451 F.2d 346 (2d Cir. 1971); United States v. D'Amata, 436 F.2d 52, 53 (3d Cir. 1970); United States v. Rothberg, 480 F.2d 534, 535, n. 1 (2d Cir. 1973). Clearly, if Guglielmelli had won on appeal in the state courts, it would have been incumbent upon the District Attorney to consent to vacating the guilty plea in Ciappetta's case, because of the agreement with Ciappetta's attorney. And the fact that Ciappetta's appeal was technically dismissed would be irrelevant to the final outcome of the case.

Though the Attorney General also argues that Guglielmelli's brief on appeal did not specifically mention Ciappetta's knowledge or understanding regarding the plea, it was not necessary to do so since the claims for both Guglielmelli and Ciappetta were virtually identical.

Finally, the Attorney General again asserts that the remedy in this case, if one is granted, should be to leave it to the courts of New York to determine whether the five-year reformatory term should be imposed or whether the plea should be vacated. The point that the Attorney General has failed to grasp, however, is that the reformatory term could not legally be imposed in 1955 nor could it legally be imposed now. Vacating the plea is thus the only remedy available.

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WHEREFORE, deponent respectfully prays that the relief sought in the petition and the amended petition be granted, and for any such other and further relief as to this Court may seem just and proper.

---

Alan Scribner

Sworn to before me this  
20th day of June, 1974.

EDNICE PURNELL  
Notary Public, State of New York  
No. 31-52010  
On Work in New York County  
Commission Expires March 30, 1976

REPLY MEMORANDUM OF LAW

A 62

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES ex rel. NANCY ROSNER,  
on behalf of FRANK CIAPPETTA,

Petitioner,

74 Civ.

-against-

WARDEN, Sing Sing Prison, Ossining,  
New York,

Respondent.

-----X

REPLY MEMORANDUM OF LAW

This memorandum is submitted in reply to the  
memorandum of law submitted by the Attorney General of the  
State of New York.

POINT I

PETITIONER HAS PROPERLY EXHAUSTED STATE  
REMEDIES

Respondent argues that the petitioner failed to  
exhaust available state remedies by neglecting to appeal from  
the order denying coram nobis in 1955. However, as the amended  
petition shows, Ciappetta did in fact appeal. The original  
confusion concerning Ciappetta's appellate litigation came  
about because the appellate process was not litigated under  
his name. Rather, after filing the notice of appeal, Ciappetta's

counsel recognized that the law, facts and circumstances of his case were identical to the case of his co-defendant, Vincent Guglielmelli. Guglielmelli and Ciappetta had both instituted the coram nobis proceeding, and the County Court hearing equally applied to both of them. Consequently, as outlined in the affidavits of Ciappetta's counsel submitted to the Appellate Division (Exhs. "B" and "C"), Ciappetta's attorney and the Appeals Bureau of the Bronx District Attorney's Office "agreed by and between us that the decision of the case of VINCENT GUGLIELMELLI shall be binding upon the appellant herein" (Affid. of Nov. 12, 1956, p. 1; Affid. of Jan. 5, 1957, pp. 1-2). Pursuant to this agreement Ciappetta's case was then litigated in the name of People v. Guglielmelli. Thus, in the Appellate Division, People v. Guglielmelli was affirmed on February 11, 1958 [170 N.Y.S.2d 986 (1st Dept.)], and leave to appeal to the New York Court of Appeals was denied by Judge Fuld on March 13, 1958.

Consequently Ciappetta exhausted his state remedies by bringing his claim before the Appellate Division and the New York Court of Appeals. Nothing more is required to preserve his claim for federal habeas corpus review. E.g., Fay v. Noia, 372 U.S. 391 (1963); United States ex rel. Ellington v. Conboy, 333 F. Supp. 1318, 1320-1 (S.D.N.Y. 1971).

## POINT II

THE PLEA MUST BE VACATED

Respondent argues that this is just another "sentence prediction" case. In so doing, respondent misconstrues the facts adduced at the coram nobis hearing as well as the memorandum of law submitted on the original petition. In pleading, petitioner was not simply relying upon a prediction as to the possible sentence erroneously made by his attorney. Rather he was relying upon the availability of sentencing alternative which did not exist. Respondent's argument would be persuasive if Ciappetta actually could have received the reformatory term as an alternative to the 20-to-life term, and then followed his attorney's advice as to which one seemed more likely. The distinction here is that the reformatory term was totally unavailable to him, since the statute on its face made it inapplicable to the crime to which he pleaded. Yet he pleaded in ignorance of this fact. By any reasonable standard, therefore, Ciappetta was ignorant of the consequences of the plea at the time he entered it.

In more concrete terms, petitioner thought the minimum sentence he could get was the indeterminate five-year reformatory term. In actual fact the minimum sentence available to him was twenty years in jail. Thus, this case is clearly distinguishable from the sentence estimate cases cited in respondent's brief. United States ex rel. LeFay v. Fritz, 455 F.2d 297 (2d Cir. 1972) concerned a mistaken subjective

belief of a promise of leniency made within the sentencing framework, the minimum and maximum for which the defendant clearly knew. United States v. Horton, 334 F.2d 153 (2d Cir. 1964) concerned a sentence recommendation by the prosecutor for less than the maximum. And United States ex rel. Scott v. Mancusi, 429 F.2d 104 (2d Cir. 1970) concerned representations as to whether a plea could be withdrawn. None of these cases cited by respondent involved the ignorance of the defendant as to the minimum sentence which could be imposed. And an understanding of the minimum, as well as the maximum, coupled with reliance, is necessary for a valid plea. See, e.g., Cabrera v. United States, 357 F. Supp. 1380 (S.D.N.Y. 1972). Moreover, respondent's attempt to distinguish the cases we rely on, particularly United States ex rel. Leeson v. Damon, \_\_\_ F.2d \_\_\_ (2d Cir. Apr. 1, 1974), slip op. 2483; Mosher v. United States, 491 F.2d 1346 (2d Cir. 1974); and Bye v. United States, 435 F.2d 177 (2d Cir. 1970) is unconvincing. As discussed in our brief accompanying the original petition, each case is fully applicable, requiring the granting of the writ here. For Ciappetta relied, not just on an opinion as to what the sentence might be, but on an objective misrepresentation that a sentencing alternative, which did not exist, did exist. He was thus ignorant of the real consequences of his plea.

Moreover, respondent has failed to respond adequately to petitioner's argument, based on Mosher, that he was

denied effective assistance of counsel. While respondent cites McMann v. Richardson, 397 U.S. 759 (1970) to the effect that a defendant "assumes the risk of ordinary error in either his or his attorney's assessment of the law", the present case involves more than just "ordinary error." The fact that the reformatory sentence was not applicable to a murder defendant was spelled out on the face of the statute. It is not an "ordinary error" for a lawyer to fail to read the statute upon which he relies when he tells the defendant what the consequences of the plea are. It is sheer incompetence.

Finally, respondent suggests that even if the plea is invalid, the courts have the option of allowing him to withdraw the plea or of giving him the sentence he bargained for. Aside from the fact that the maximum reformatory term would have expired a long time ago, this is not a sentence promise case, such as Santobello, 404 U.S. 257 (1971), where the relief could be fashioned in terms of the promise made. Here, without knowledge of the consequences of the plea, the plea is simply invalid, and therefore must be vacated. And, most importantly, the reformatory term, which presumably is the alternative to vacating the plea, could not legally be imposed in 1955, nor could it legally be imposed now. Vacature is thus the only remedy.

Respectfully submitted,

ROSNER, FISHER & SCRIBNER  
Attorneys for Petitioner

Of Counsel:

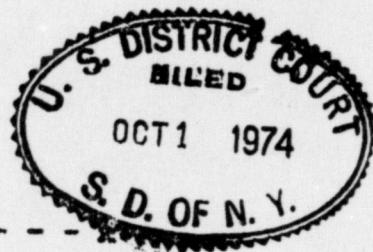
ALAN SCRIBNER  
NANCY ROSNER

COPY

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MEMORANDUM OPINION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES ex rel. NANCY ROSNER  
on behalf of Frank Ciapetta,

Petitioner.

#4245

-against-

WARDEN, Sing Sing Prison,  
Ossining, New York,

74 CIV. 1643

Respondent.

APPEARANCES

NANCY ROSNER  
ALAN SCRIBNER  
Rosner, Fisher and Scribner  
401 Broadway  
New York, New York 10013

Attorneys for Petitioner

LOUIS J. LEFKOWITZ  
Attorney General  
State of New York  
By: Arlene R. Silverman  
2 World Trade Center  
New York, New York 10047

Attorneys for Respondent

CONSTANCE BAKER NOTLEY, D. J.

MEMORANDUM OPINIONIntroduction

Petitioner in this habeas corpus petition is presently in the custody of the New York prison authorities within the Southern District of New York pursuant to a judgment of conviction entered on June 24, 1955 (Hon. Eugene G. Schulz, Bronx County Court) in which petitioner was sentenced to 20 years to life. Said conviction was founded upon petitioner's plea of guilty to murder in the second degree entered on May 2, 1955. The plea, which is the subject of the present application, was made after the trial of petitioner and four co-defendants for the crime of murder in the first degree had been in progress for two weeks. At all times petitioner was represented by retained trial counsel, Stephen A. Fuschino, Esq.

The essence of petitioner's claim is that his guilty plea was entered without the knowledge of its consequences, hence in violation of due process of law. The basis for this claim is that at the time of pleading petitioner, although informed of the maximum sentence, mistakenly believed that a minimum sentence in a reformatory was also available. In the

alternative, petitioner argues that he was denied the effective assistance of counsel in violation of his Sixth Amendment rights. The basis of this claim is his trial counsel's admitted error in urging the legality of a reformatory sentence despite clear statutory language to the contrary. In opposition the state contends that the petition should be dismissed for failure to exhaust state remedies. 28 U.S.C. § 2254(b). On the merits, the state argues that petitioner's plea was compatible with the Constitution; that is, it was freely and voluntarily entered with adequate knowledge of its consequences. For the reasons which follow, the court after finding exhaustion agrees with respondent's position that petitioner's plea was constitutionally entered and accordingly denies the petition.

#### Exhaustion

While the procedural course of petitioner's claim is somewhat unique, the court is satisfied that the state courts have had a "fair opportunity" to decide the ultimate issue presented. Picard v. Connor, 404 U.S. 270, 276 (1971).

Following his conviction and entry of judgment as noted above, petitioner on August 31, 1955 brought on a motion

in the nature of a writ of error coram nobis, seeking to vacate judgment of conviction. The ground asserted in that application was, as here, a challenge to the voluntariness of the plea. One of petitioner's co-defendants, Guglielmelli, made a similar application and a hearing on both applications was held on November 4, 1955. The minutes of the hearing coram nobis indicate that petitioner decided to plead guilty on the hope of being sentenced to the Elmira Reception Center for a maximum of five years. (Minutes, pp. 21, 22 and 47.) That is, petitioner and Guglielmelli were led to believe that due to their age a reformatory sentence was a possible sentencing alternative (Minutes, pp. 26 27 and 48.), whereas due to the gravity of the offense, such alternative was not possible (Former N.Y. Penal Law § 1048).

The County Court denied the application of both petitioner and Guglielmelli. The County Court found that the petitioner pled guilty on the representation made by counsel that there was a possibility of obtaining a reformatory sentence, and that such a claim was legally insufficient to invoke the remedial process of coram nobis. (Opinion of December 6, 1955 attached to original petition as Exhibit D.)

Following this denial, petitioner filed a notice of appeal on January 13, 1956. Subsequently an agreement was made between petitioner's counsel and the Appeals Bureau of the Bronx County District Attorney's office to the effect that the appeal in petitioner's case would be determined by the decision on appeal in the case of petitioner's co-defendant Guglielmelli. This agreement is evidenced by affidavits by petitioner's appellate counsel on November 12, 1956, and January 4, 1957, submitted in support of petitioner's various requested adjournments. (See Exhibits B and C respectively attached to Amended Petition.) In particular the November 12 affidavit asserts:

"Your deponent is of the opinion that the facts, circumstances and law are identical in both appeals and your deponent has discussed this matter with the Appeals Bureau of the District Attorney's Office: Bronx County and it has been agreed by and between us that the decision of the case of VINCENT GUGLIELMELLI shall be binding upon Appellant herein."

Subsequently the order of the County Court denying coram nobis was affirmed as to Guglielmelli. People v. Guglielmelli, 5 A.D.2d 815, 170 N.Y.S.2d 986 (1st Dept.), cert. denied, Guglielmelli v. New York, 358 U.S. 899 (1958). (Additionally leave to appeal to the Court of Appeals of the State of New York was denied by Judge Stanley H. Fuld on March 13, 1958.)

In opposition to petitioner's contention that the above described course satisfies the exhaustion requirement of 28 U.S.C. § 2254(b), respondent argues that petitioner never perfected the appeal of the denial of coram nobis on December 6, 1955 and that indeed on May 16, 1957 the appeal he had initiated was dismissed for lack of prosecution. According to respondent, the affidavits by his appellate counsel on which petitioner relies were treated simply as requests for extensions, and thus petitioner mistakenly relies on the agreement that the disposition of the Guglielmelli case would be controlling. Respondent further notes that Guglielmelli's briefs on appeal make no representation as to what petitioner's understanding was, thus the state has not had an opportunity to decide the issues as to petitioner.

The court notes that, contrary to respondent's position, defendant Guglielmelli and petitioner were both represented by the same trial counsel and it is the constitutional significance of trial counsel's advice given to both defendants which was at issue in Guglielmelli's collateral proceedings.

See United States ex rel. Figueroa v. McMann, 411 F.2d 915 (2d Cir. 1969). Further, as the above description makes clear, petitioner relied on the agreement reached between his appellate counsel and the state's authorized agents. In the court's opinion, the state is now estopped from arguing that petitioner has failed to exhaust when his failure was due to reasonable reliance on the agreement that the disposition as to Guglielmelli would be binding as to petitioner. The court notes that nowhere does respondent challenge the existence of said agreement.

Finally the court notes that while petitioner admittedly and without explanation failed to directly appeal his state court conviction, a motion to vacate judgment at this time would be futile. N.Y.P.L. § 440.10-2(c). In light of petitioner's efforts to raise the present issue before the state courts, both in his own name and in the case bearing that of Guglielmelli, the court cannot characterize petitioner's

failure to appeal directly as a deliberate bypass of state procedures. Fay v. Noia, 372 U.S. 391 (1963).

Voluntariness of the Plea

On the merits, it is petitioner's contention that his plea was involuntarily entered, and hence in violation of due process, in that he did not fully understand the consequences of his plea. Kercheval v. United States, 274 U.S. 220, 223 (1927). Just as the current standard as to voluntariness in federal cases, as found in McCarthy v. United States, 394 U.S. 459 (1969) was not made retroactive Halliday v. United States, 394 U.S. 831 (1969), the Court of Appeals for the Second Circuit refused to treat the state counterpart, as found in Boykin v. Alabama, 395 U.S. 238 (1969), retroactively. United States ex rel. Rogers v. Adams, 435 F.2d 1372 (2d Cir. 1970), cert. denied, 404 U.S. 834, rehearing denied, 404 U.S. 996 (1971). Nevertheless, "a state prisoner who believes himself aggrieved by a plea proceeding and who raises a sufficiently credible challenge to the voluntary nature of his plea, may have a federal hearing." 435 F.2d at 1375. Here, however, the court finds petitioner's challenge to the voluntariness

and intelligence of his plea insubstantial and declines to hold a hearing.

The essence of petitioner's claim is that when he entered his plea he was laboring under the mistaken belief that there existed a shorter reformatory sentence as an alternative to the twenty years to life term about which he was concededly aware. This false impression was created by counsel's advice and his reference to an unresponsive letter from the warden of the Elmira Reformatory regarding the availability of a reformatory sentence. The trial court at all times doubted the legality of a reformatory sentence, and consequently entered into no sentencing promises with trial counsel. The trial court did, however, encourage trial counsel to investigate the availability of the reformatory sentencing alternative, noting that petitioner was then 17 years old.

For petitioner's argument that his plea was involuntarily entered to be persuasive, the court would have to accept the proposition that voluntariness and knowledge of the consequences of a plea can only be satisfied if the defendant knows both the maximum and minimum time that might be served in satisfaction of the judgment. This the court declines to do. It is well established that the "maximum" sentence one might get is

a consequence about which, under due process standards, a defendant must be informed. Marvel v. United States, 380 U. S. 262 (1965) (per curiam); United States ex rel. Leeson v. Demon, 496 F.2d 718 (2d Cir. 1974). Jones v. United States, 440 F.2d 466 (2d Cir. 1971) (similarly under Fed. R. Crim. P., Rule 11). Research fails to uncover any authority for petitioner's proposition that knowledge of the minimum is equally essential. The absence of cases is logically the result of the weakness of the claim — defendants petition for redress when they are sentenced to more time than they thought possible, not less.

Analytically, petitioner's claim is most analogous to a "prediction case," that is, petitioner was induced to plead due to an erroneous assurance of leniency made by defense counsel. Under the circumstances present here, as in other prediction cases, petitioner's plea was not involuntary. United States ex rel. Scott v. Mancusi, 429 F.2d 104, 108 (2d Cir. 1970), crt. denied, 402 U. S. 909 (1971); United States ex rel. Bullock v. Warden, 408 F.2d 1326, 1330 (2d Cir. 1969), crt. denied, 396 U.S. 1043 (1970). In sum, an erroneous sentence estimate by defense counsel does not render a plea involuntary.

Petitioner relies on the recent case of Mosher v. La Vallee, 491 F.2d 1346 (2d Cir.), cert. denied, 42 U.S.L.W. 3533 (April 1, 1974) in which the granting of a writ of habeas corpus to a state prisoner was affirmed, where the petitioner had been induced to plead guilty based upon the assurances of counsel that the trial judge had promised to give the defendant the minimum sentence, whereas defendant received a greater term and most importantly no such promise had in fact been made. Petitioner's reliance on Mosher is misplaced, since his claim is not one founded on a judge's promise, but rather seen in a light most favorable to petitioner a misrepresentation as to the trial judge's view of the availability of a sentencing alternative. In the court's view, such misrepresentation cannot be equated with a promise of a minimum or lenient sentence.

Petitioner would also have the court rely on Eva v. United States, 435 F.2d 177 (2d Cir. 1970) in which the district court was instructed to hold an evidentiary hearing on whether the petitioner knew at the time of his guilty plea that as a narcotics offender he would be ineligible for parole. The Second Circuit expressed the view that such ineligibility was a consequence of the plea about which a defendant must be informed. 435 F.2d at 179. While the Eva case and the

present one both involve the length of time an accused will have to spend in prison, they are distinguishable. The focus of Bye was on the risk of lengthy imprisonment. Under Bye a defendant is entitled to have accurate information when computing the opportunity, or lack thereof, for release prior to completion of sentence. The instant case is not concerned with the mathematics of such risks while serving a sentence. Instead it is concerned with the absolutes of the availability of sentencing alternatives ab initio.

Effective Assistance of Counsel

Petitioner's final claim is that his plea should be vacated because he was denied the effective assistance of counsel. The court notes that when a defendant enters a guilty plea he waives the right to trial and "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts." McMann v. Richardson, 397 U.S. 739, 774 (1970). Further, "erroneous advice by defence counsel as to sentence does not support attack. . .unless it amounts to 'ineffective assistance of counsel'. . . ." United States v. Norton, 384 F.2d 153, 155 (2d Cir. 1964) (relief sought under 28 U.S.C. § 2255). The requirements for establishing

inadequacy of counsel are stringent, United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972) (cases collected), cert. denied, 410 U.S. 917 (1973) and under the present facts, petitioner has failed to carry his burden of proving the claimed ineffectiveness.

Petitioner argues that trial counsel's insistence on the legality of a reformatory sentence is conclusive proof of his ineffectiveness, since the statute relating to reformatory sentencing specifically excluded male persons convicted of "crimes punishable by death or life imprisonment" (former N.Y. Penal Law § 2184-a) and the punishment for murder in the second degree was then from twenty years to the "offender's natural life" (former N.Y. Penal Law § 1048). Petitioner claims that trial counsel's failure to read or understand the plain meaning of the relevant statutes and to accurately convey their purport to defendants amounted to ineffectiveness. The court can find no logical explanation for counsel's failure to appreciate the impossibility of a reformatory sentence in light of a plea of guilty to murder in the second degree. However, insofar as petitioner had been apprised of the maximum sentence and his plea has been found to be voluntary, the trial proceedings do not shock the

conscience of the Court, nor were they a "farce and mockery of justice", United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950) (citations omitted). While counsel's error is unexplained, it can hardly be said that his representation was so "horribly inept" as to amount to "a breach of his legal duty faithfully to represent his client's interests", United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971) (quoting other sources).

For the reasons noted above, the petition is dismissed.

Dated: New York, New York

September 30, 1974

SO ORDERED

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CONSTANCE BAKER MOTLEY  
U. S. D. J.

A 81

EXTRACTS FROM THE ORIGINAL RECORD

COUNTY COURT \* COUNTY OF BRONX

-----x  
THE PEOPLE OF THE STATE OF NEW YORK

against

FRANK CIAPPETTA  
VINCENT GUGLIELMELLI

Hearing Coram Nobis

Defendant s

-----x  
(Murder in the Second Degree)

BEFORE:

HON. EUGENE G. SCHULZ ,

County Judge.

APPEARANCES:

For the People:

By : DANIEL V. SULLIVAN, Esq.,  
District Attorney, Bronx County,  
ANDREW C. McCARTHY, Esq.,  
Assistant District Attorney.

For the Defendant Ciappetta:

FREDERICK W. MILLER, Esq.

For the Defendant Guglielmelli:

JACOB W. FRIEDMAN, Esq.

John P. Cullen  
Official Court Reporter

## I-N-D-E-X

<u>Name</u>	<u>Direct</u>	<u>Cross</u>
Stephen A. Fuschino	3	
Vincent Guglielmelli	30	
Criscenza Guglielmelli	33	
Frank Ciappetta	45	
Bessie Ciappetta	51	
Vincent Guglielmelli (Resumes the stand)		55
Andrew C. McCarthy, Esq.	62	63

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MR. FRIEDMAN: May I, on behalf of the Defendant Guglielmelli, respectfully move the Court for a separate and independent hearing on his behalf, so that the matter will be deemed severed from the other application which has been set simultaneously for hearing by Your Honor.

THE COURT: Yes. I understand, however, that Counsel for the other side will sit in for the other defendant.

MR. FRIEDMAN: I have no objection.

THE COURT: And I understand he can avail himself of the testimony taken in this hearing that you contemplate having, is that correct?

MR. FRIEDMAN: If he is so advised, I have no objection.

THE COURT: I will permit that. At the same time, I am trying to expedite this case.

MR. FRIEDMAN: I will try to cooperate.

THE COURT: And you consent to this severance?

MR. MILLER: I do.

THE COURT: At this time, with the understanding you will proceed immediately on the completion of Counsel's case.

MR. MILLER: That's right.

MR. FRIEDMAN: Very good.

COURT CLERK LEBZELTER: The People of the State of New York against Frank Ciappetta and Vincent Guglielmelli.

STEPHEN A. FUSCHINO, 238 East 72nd Street, New York, New York, a witness called on behalf of the Petitioner Guglielmelli, having been first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. FRIEDMAN:

Q Mr. Fuschino, are you an attorney and Counsellor at Law duly licensed and admitted to practice in the courts of this state? A I am.

Q Did you represent a defendant named Vincent Guglielmelli in the defense of an indictment charging him with the commission of Homicide? A I did.

Q Now, that indictment was filed, I think it will be conceded by the District Attorney, on or about June 15th, 1954. How soon -- withdrawn. At what stage of the proceedings were you retained to represent that defendant?

A I would say, my recollection, roughly around the time when he was arrested.

Q And when was that, with reference to the filing of the indictment? A Before the filing of the indictment.

Q And you represented him continuously from his

arrest until certain things took place at the trial, is that correct? A Yes.

Q Who retained you to represent Vincent Gugliel-melli? A The parents.

Q Do you remember, during the pendency of the proceedings, and sometime prior to the trial, having any conversations with any of the prosecuting officials charged with the handling of this case? A Before the commencement?

Q Yes, sir. A Yes.

Q Approximately when was that, if you can recall? A Around the time when a motion was made by the District Attorney for a special panel.

Q Yes. A I think it was on the return day of that motion.

Q Well, I'll refresh your recollection, that on January 27th, 1955, according to the affidavit of Mr. McCarthy, the District Attorney made an application for a special panel to try the case. Do you remember that?

A That was the first return day?

Q Yes, that was when the motion was made, and it was adjourned until February 4th, 1955, at the request of one of the defendants, one Santaniello. Do you recall that? A Yes; it went over until February the 4th, on

that date.

Q Now, on or about February 4th, did you have a conversation with Mr. Andrew C. McCarthy? A Just let me check that for a minute. I think we had a conversation the first return day, and then I had another conversation on the 4th of February.

Q Well, now, directing your attention to the first conversation, where did that take place? A Outside the courtroom in the hall, right in front, before entering the courtroom to answer the motion.

Q And who participated in that conversation?

A I spoke to Mr. McCarthy.

Q Would you tell us what you said to Mr. McCarthy and what Mr. McCarthy said to you on that occasion?

A I asked him whether or not we couldn't sit down to discuss a disposition of the case.

Q What did Mr. McCarthy say? A He said to me he would have to sit down with the District Attorney, Mr. Sullivan, and that he would be glad to arrange an appointment.

Q And is that all that was said? A He said in view of the fact that this motion is going to go over to February the 4th, he suggested that a tentative appointment should be made for 11:00 o'clock on February the 4th,

because we would be in the building to dispose of the motion and we could dispose of the appointment on the same date.

Q And the motion came up for formal hearing on February the 4th? A On February the 4th.

Q Was that motion consented to by the defendants or was it opposed? A It was opposed.

Q Was it argued in court? A It was -- I think it was submitted, with opposing affidavit.

Q And after the submission of that motion, did this conference that had been arranged on the prior occasion take place? A No, no.

Q What happened? A Mr. McCarthy informed us Mr. Sullivan did not desire to have a conference.

Q You say he informed you. Do you mean you and some other Counsel? A The attorneys representing the other defendants.

Q That was all that took place in the way of a conversation between you and Mr. McCarthy on February the 4th? A That's all.

Q Did you have a conversation on or prior to February 4th with any other assistant district attorney with regard to the case? A No.

Q When was the next conversation, if any,

following February 4th, 1955, with any representative of the District Attorney? A It was sometime after April 18th, 1955, I would say; maybe it was the 19th or maybe it was April the 20th. I don't recall now.

Q All right. Sometime about April 18th, 19th or 20th you had another meeting with Mr. McCarthy, was it? A No; I -- it was after April 18th. The 19th or the 20th I went inside and asked for an appointment with Mr. Sullivan, District Attorney, and he granted me an appointment. I think it was, I think it was 9:30 in the morning of Thursday, April the 21st, at which time Mr. McCarthy and another Assistant were present.

Q What was the name of the other Assistant?

A I think it was Mr. Peltin.

Q Mr. Who? A Peltin.

Q And you and Mr. Sullivan and Mr. McCarthy and Mr. Peltin, did you say? A Peltin.

THE COURT: Peltin, Chief Assistant.

Q Were present, and you had this meeting?

A Yes.

Q Where did this take place? A In the office of Mr. Sullivan.

Q And will you state, as well as you can recall, what was said by any of the participants, or by all of the

participants in this conversation or conference? A I said to Mr. Sullivan, I would like to discuss with him the possibility of the two cases of the two persons whom I represented.

Q What defendant did you represent, in addition to the defendant Guglielmelli? A Ciappetta.

Q And -- A What plea.

Q And what was the response of Mr. Sullivan? A He said I should go back to the courtroom and I would be notified what they would consider.

Q Was that all that took place at that conversation? A Just about all that took place.

Q And you say this was about April 19th? A No; I think it was Thursday morning, April the 21st, I think about 9:30 in the morning I went in to see him first and came into the courtroom.

Q Hadn't the trial commenced on April 19th? A No -- well, it was on for the 18th, and it had commenced on the 19th.

Q That is the examination of the jurors, the selection of the jury began on the 19th? " Yes.

Q Now, how long did the examination of the jury take? A My recollection is that it took up until Friday, April the 22nd, or maybe Monday, the, April the 25th.

Q Well, now, actually didn't it take an entire trial week? A I think it ended, I think that we continued selecting on Monday, the 25th.

MR. FRIEDMAN: Perhaps we can stipulate. I think, didn't it continue through April 27th, Mr. McCarthy, or wouldn't your records show.

MR. McCARTHY: My records don't show, and he may be correct.

THE WITNESS: I am just trying to remember, but I have no records on it.

Q At any rate, several days were consummated in the impanelling of the jury, isn't that true? A Yes.

Q After this meeting which you have described with Messrs. Sullivan, McCarthy and Peltin, did any other meeting take place between you and any representative of the District Attorney? A No, except that I think Mr. McCarthy brought me a message.

Q Yes. A To the effect that if the two defendants would consider pleading guilty to the crime of Murder in the Second Degree, they would be inclined to recommend the acceptance of such a plea.

Q And is that all that Mr. McCarthy said on that subject? A That's all.

Q All right. Now -- A I think I asked him

was there any chance of pleading to Manslaughter in the 1st Degree, and he said that they would not recommend the acceptance of such a plea for those two defendants.

Q Now, while these conversations were taking place, did you have any discussions with the Court, with Judge Schulz, with regard to a disposition of the case?

A Whether it was before that meeting with Mr. Sullivan or after, my records aren't clear, but we did have several meetings in -- with the Judge, in chambers.

Q And what is your best recollection as to the date of these meetings, Mr. Fuschino? A I have no recollection as to when they started, whether it was Friday, April the 22nd, or after that. I don't recall now at all.

Q Could you give us a time range within which they occurred, according to your best recollection? A I don't recall, actually recall the first time that I asked to speak to -- in connection with this case, I asked to have a conference with His Honor Judge Schulz.

Q Do you know when it was with reference to the procedure of the impanelling of the jury? A It might have been while we were still picking the jury.

Q You mean in between court sessions of the impanelling of the jury? A Yes.

Q Now, Mr. Fuschino, who was present when you had these conversations with His Honor? A All the trial attorneys and Mr. McCarthy, and I think Mr. Tiger with Mr. McCarthy. I am not so sure about that, but I know Mr. McCarthy was there.

Q Can you tell us, Mr. Fuschino, as well as you can recall, what was said at these conferences with the Court? A Well, at the first conference I had asked to have a conference to discuss the disposition of the case.

Q But, before you go into that, was anything said at any of these conferences, Mr. Fuschino, where anybody was bound to secrecy or was there anything about them which made them have a confidential character so that you would have any hesitance at all in disclosing the tenor of these conversations? A I don't think anybody said anything specifically.

Q Now, will you proceed and tell us what was said at the first of these conferences? A I had asked for the conference, with a view of disposing the two cases, and I think at the first conference, I think it was either I or Mr. McCarthy told His Honor that the District Attorney would be inclined to recommend the acceptance of a plea to Murder in the Second Degree, if the two defendants were inclined to plead to those charges, and I think His

Honor said he would accept such a plea if the District Attorney would recommend it. Then I told him I had discussed the matter with the family.

Q Just a minute. You say you told him. You mean His Honor? A Yes; I think I told His Honor and everybody present I had discussed the matter with the family and they were concerned with the sentence. It was, I think it was the first or second meeting His Honor said he could not make any promises to me as to what the sentence would be. I told him I fully realized that, but I was wondering if it was a possibility of the two defendants, or the younger one of the two receiving a sentence to Elmira Reception Center, without a definite term, under the correction law, under which section the cases had said that a sentence under that section would have a maximum of five years. The first time --

Q I beg your pardon? A The first time I brought that up, His Honor said he didn't think that he could give that sentence to these boys.

Q Were you referring to some recent amendments of the Correction Law and the Penal Law, which went into effect about February 1st, 1955? A That's right.

Q And you say Judge Schulz said that he did not think that he could proceed under those statutes? A Under those statutes.

Q To send the boys to the Reception Center.

A There to be treated according to law.

Q Was anything said about any communication to check or verify? A He suggested I look up the law on it, and I should show it him if I felt such a sentence would be a legal sentence. Then I think the next conference I then informed him I had read the section, and I felt that such a sentence could be a legal sentence. Then I think a suggestion was made I discuss it with Mr. Lee.

Q That is another Assistant District Attorney?

A Yes, in the District Attorney's Office, and I discussed it with him, and he and I together looked up the law on it and it was late at night, it was about five o'clock, and he suggested the next morning I stop in and he'd have more to discuss with me on that section.

Q You mean Mr. Lee said that? A Yes; the next morning I met Mr. Lee, and he said he had gone over the section and it wasn't clear in his mind whether or not a sentence like that could be imposed. He felt that in his opinion it could be imposed. So, then I don't know who made the suggestion, but then I was told --

Q By whom? A By Mr. Lee, that a letter had been sent up to the warden.

Q A letter from whom? A I don't remember, a letter from whom, but I understand a letter had been

sent up to the warden of Elmira Reception Center, asking them whether or not -- no, a letter was sent to the warden of Elmira Reception Center, to find out whether or not they would accept the boy if he was sentenced under that section.

Q Are you referring to Section 2184a of the Penal Law? A Yes.

Q You say a letter was sent to the warden of the Elmira Reception Center? Was that Doctor Glenn Kendall? A I don't remember the name.

Q You don't remember from whom the letter came? A That's right.

Q Or who was the writer of the letter? A Yes; I don't remember.

Q Well, now, did you subsequently hear from anybody that that letter had been answered by the warden of the Elmira Reception Center? A Yes; I had another conference with His Honor Judge Schulz, at which time he said that he had received the letter, but he didn't like the letter.

He said that he felt it was not response -- it was not to the point that he had in mind, as to whether or not it was a legal sentence.

Q Do you know whether that letter from the warden of Elmira Reception Center was addressed to His Honor?

A Yes; it was.

MR. FRIEDMAN: With all due respect to Your Honor, might I inquire whether there is such a letter available?

THE COURT: Have you that letter, Mr. Mitchie? I recall getting the reply. I don't know whether I have it. Show it to Counsel.

(Mr. Mitchie hands letter to Mr. Friedman)

THE COURT: Are you finished with it?

MR. FRIEDMAN: I beg your pardon?

THE COURT: Do you want to use that?

MR. FRIEDMAN: Yes. May I, Your Honor?

THE COURT: Surely.

Q I show you this letter, Mr. Fuschino, and ask you whether this is the letter which was exhibited to you sometime shortly after the date that it bears? A Yes; this is the letter.

MR. FRIEDMAN: May I offer that in evidence, or read it into the record, whichever Your Honor thinks --

MR. McCARTHY: No objection.

THE COURT: You do whatever you wish. It is perfectly --

MR. FRIEDMAN: I am going to take the liberty

of reading it into the record.

THE COURT: Go ahead.

MR. FRIEDMAN: This letter is from the State of New York Department of Correction, Reception Center, Elmira, New York. Glenn M. Kendall, Director. April 22nd, 1955. Personal and confidential. Honorable Eugene G. Schulz, 851 Grand Concourse, Bronx, New York. Dear Judge Schulz: This letter is written at the request of Assistant District Attorney Lee, who called me by telephone this afternoon in regard to a case now pending in your court.

As I understand it, the facts in this case are as follows: Vincent Guglielmelli committed a homicide on June 1, 1954, at which time he was 15 years of age. Transfer to Children's Court was denied, and he was indicted for Murder in the 1st Degree. On February 18th, 1955, the defendant became 16 years of age.

The question under consideration seems to be as to whether, if the defendant pleads guilty to Murder in the Second Degree, he can be committed to the Reception Center, without sentence being fixed by the Court, in which case he would

have no minimum, and a maximum of five years.

What I shall give you now is, of course, my opinion, based on experience here at the Center. I think there is little question that commitment of an offender 16 to 21 years of age convicted of Murder in the Second Degree may be made to the Center without sentence being fixed by the Court, provided the offense, conviction and sentence all occurred after the offender was 16 years of age. We have had a number of such cases which we have accepted, and the Reformatory sentence has never been challenged.

However, we have, to my knowledge, never had a case like the one under consideration, where the Murder occurred before the offender reached the age of 16, with conviction and sentence occurring after 16.

When the center first opened on November 1, 1945, the question of whether the date of commission of the offense or of conviction or sentence should govern the legality of commitment was covered by a ruling of the Attorney General to the effect that the date of conviction and sentence was the determining date.

Chapter 803 of the Laws of 1954 which took effect on February 1, 1955, again raised this question, and we now have an inquiry pending in our Albany office.

It is my opinion that commitment here in this case will be legal and proper, and we will accept him, if you see fit to make such commitment. Furthermore, if he is committed without sentence being fixed by you, we will, in accordance with the law, consider his sentence to be what is called a reformatory sentence, with a five year maximum and no minimum.

While we will accept him, we will, of course, send the records to Albany after receiving him, and cannot guarantee that no question will be raised. I hardly think there will be, but if there is and the Attorney General rules that for some reason the commitment was not proper, the boy would, of course, have to be returned to your jurisdiction for further consideration and resentencing.

I am not a lawyer and there may well be points of law with which I am not familiar, particularly with regard to offenses committed

Before the boy is 16.

I might point out that the new Reception Center Law includes juvenile delinquents as offenders who may be committed to the Reception Center. If it is possible to commit a juvenile delinquent who is past the age of 16 to the Reception Center, it certainly seems that the case under consideration would be a proper commitment.

If I can be of any further assistance, please do not hesitate to get in touch with me. Yours very truly, Glenn M. Kendall.

MR. McCARTHY: I am going to ask Your Honor to suggest to Counsel, we might have that letter just read marked for identification.

MR. FRIEDMAN: Very well.

THE COURT: No objection?

MR. FRIEDMAN: No.

MR. MILLER: No.

(Document marked Petitioner's Gug' Imelli  
Exhibit A, for Identification)

MR. McCARTHY: I believe, Your Honor, in view of the fact the Court Reporter has asked for the correct spelling of one of the Petitioners and in response thereto Petitioner's Counsel has spelt the name differently than we have had it

on our indictment, on our arrest and the court record of sentence here and final judgment, that we ought to have a stipulation now wherever Counsel is using the name of Guglielmelli, as it is spelt, G-U-G-L-I-E-L-M-E-L-L-I, it is the same person as the Petitioner who, on the official records of the court, is spelt G-U-G-L-I-E-M-E-L-L-I.

THE COURT: Very well.

Q Mr. Fuschino, referring to this letter which I just read into the record, you said that letter was submitted to you? A Yes.

Q Who showed you that letter? A His Honor, Judge Schulz.

Q And what did you do with the letter, if anything? A First he gave it to me to read. He said, "I received a letter and I don't like it. It does not answer the question whether it is a legal sentence." He said, "Here, read it," just before recess, during one of the court days. So, I read the letter. Now, all during these discussions in trying to dispose of this case with a plea, I was in constant conference with the family.

Q By "family" who do you mean? A The mother and father of this boy, and they were concerned about the

sentence. They had asked me if he was to plead guilty to Murder in the Second Degree, what could he receive. So, I told them he could receive 20 years to life or, in my opinion, he could receive a sentence under Section 21 -

Q 84a? A - 84, subdivision a.

THE COURT: That was in your opinion.

THE WITNESS: In my opinion.

THE COURT: Had I ever indicated to you I believed that to be the fact?

THE WITNESS: You had indicated that you believed it was not the fact; you had said you didn't think it was a legal sentence, but I have felt, in my opinion, it was a legal sentence, and that I said to the mother and father that you might be able to get such a sentence. So, on the day that I got this letter to read, I went out in the hall during the recess to talk to the mother and father.

Q Did you have the letter with you then?

A I had it in my pocket.

Q Yes. A Because the court was in recess, and I didn't get a chance to return it. So, I was out in the hall talking to the mother and father and trying to make up their mind what they should do. I said to them

that I felt, in my opinion, that they should take the plea. I said that as proof of the fact you have a real honest and fair judge here, I said, "He has gone all out in trying to find out what he could do to help your boy," and I took this letter out and showed it to them. I said, "You never heard of such a thing."

Q When you showed the letter, did Mr. and Mrs. Guglielmelli, the parents of this defendant, read that letter? A Yes; they did.

Q Did they have a conversation with you about it? A Yes; and I said --

Q Just what did they say, and you say, about it? A I said to them, I said, "You never heard of such a thing, that a judge would go out so far to try to help the boy, and, "I said, "Here is a letter that he has received showing that such a sentence, if imposed, that the Elmira Reception Center would accept the boy." So, I said, "Although there is no promise here, there is a good chance, in view of his good background, he might get such a sentence." Rather than chance a case going to the jury, I felt that they should take the plea.

Q Did they ask you anything further about the meaning or significance of the letter from Doctor Kendall?

A I don't remember whether it was anything else.

Q You have given us all that you recall about your conversation with the parents? A Yes.

Q And did you have any further conversation with Mr. Lee other than the one which you detailed a little while ago? A No.

Q Well, now, passing on to something else, after the jury was selected, did you have a conversation with the parents of Vincent Guglielmelli again? A We had conferences every day on this case.

Q All right. Well, I direct your attention specifically to a conversation which took place where at some point in the proceeding they decided to terminate your employment as attorney. A Well, that goes back. You see, the case was on the calendar for the first time on April the 18th, 1955.

Q In other words, what you are going to tell us, what you are going to tell us now about the attempt to terminate your services -- A Took place on the 18th.

Q -- took place prior to your seeing this letter and having this discussion with them. A Yes, prior to all the discussions.

Q Well, now, was this when the jury began to be selected? A No; the case was on for the first time on April the 18th, 1955, at which time, when the case was

called, I had marked it ready for both defendants. One of co-Counsel representing another defendant had asked for an adjournment on the ground he was actually engaged. The case was put over until the next day, April 19th, 1955. We left the courthouse sometime that day and I think it was around five or six o'clock, but I am not so sure, the parents of Guglielmelli got in touch with me and told me they wanted to drop me as the lawyer in the case.

Q Who said that, Mr. or Mrs. Guglielmelli, if you remember? A Both, I think, were there. My recollection is both were there.

Q Was this in person they were speaking to you, face to face? A I think it was, yes, I think it was in the evening, and they said they wanted to drop me and they felt I shouldn't represent two defendants, and they wanted to get their own.

Q The reason they assigned was your representation of a co-defendant? A Co-defendant.

Q That's Ciappetta. A Ciappetta. So, the next day, on the 19th, when court --

Q You made certain -- A -- when the case was called, I made an application to withdraw as attorney for the defendant Guglielmelli.

Q Now, without taking you over what occurred in

the courtroom, Mr. Fuschino, do the minutes correctly reflect what occurred between you and the Judge and other persons present? A Yes.

Q And if I asked you the questions as to what occurred, as to what you said to the Court and what the Court said to you, your answers would be substantially the same as the stenographic record shows, is that correct? A Yes.

Q Now, let me ask you one other thing. Between the time of the indictment on June 15th, 1954, and the commencement of the trial in April, 1955, about ten months elapsed, is that right? A Yes.

Q Now, did you at any time apply for any adjournment of the case? A No.

Q Was the lapse of time between the indictment and the trial due to any act or conduct or proceeding which you took on behalf of either Guglielmelli or the other defendant you represented? A No.

Q And you were present when the plea was entered on May 2nd, 1955? A Yes.

MR. FRIEDMAN: All right, I think that's all.

THE COURT: Do you wish to examine, Counsellor?

MR. MILLER: Yes.

DIRECT EXAMINATION BY MR. MILLER:

Q Mr. Fuschino, at the time you had shown this letter that was addressed to Judge Schulz to the Guglielmelli family, did you also show this to the Ciappetta family? A No.

Q Did the Ciappetta family learn, through you, of the existence of this letter? Did you ever tell them there had been some discussion about the possible sentence of the boys to Elmira Reception Center, including the Ciappetta boy? A That there was a discussion, yes.

Q And did you ever tell them that a letter had been received by Judge Schulz? A I might have told them something had been done along that line, but I don't remember whether I told them about the letter.

Q Do you remember whether or not at any time after the trial commenced and in the various discussions with the Ciappettas and the Guglielmellis, that you indicated to Mrs. and Mr. Ciappetta or the defendant Frank Ciappetta that there was a possibility of his being sent to the Elmira Reception Center? A I said, yes, I did.

Q That, in other words, I have reference strictly now to Ciappetta. A Yes.

Q He also was informed that there was a possibility

of being sent to Elmira? A He could get 20 years to life to be sent to Elmira.

THE COURT: You stated that as your opinion?

THE WITNESS: Yes; I had told them I felt, in my opinion, taking everything into consideration, that there might be a possibility they would receive this sentence.

Q Now, was there some reluctance on the part of Frank Ciappetta to accept the plea, initially? A The first time, yes; they didn't want to take the plea of Murder in the Second Degree.

Q Did he explain to you at that time why he didn't want to take the plea? A Only that he thought he would want to get a lower one, if he could. He wanted a lower plea.

Q Did he also state to you that he felt that this 20 years to life was -- this idea he might get 20 years to life was disturbing him? A Yes.

Q And on subsequent conversations, did you have any conversations as this trial was progressing, with Ciappetta and Guglielmelli, at Counsel table, during recesses, before and after trial? A Yes.

Q And there were times, were there not, that after, during recesses, you would talk to Mr. McCarthy

about the case and he would come over to the Counsel table where the two defendants were sitting, and he would discuss the plea and the suggestion he take a plea?

MR. McCARTHY: Just a moment.

A I wouldn't know, after discuss --

MR. McCARTHY: I wanted to enter a plea - may that question be read?

(The question was read by the Reporter)

MR. MILLER: Withdraw the question.

Q Were there times during the trial, or the recess of the trial, that you would go over and discuss the case with Mr. McCarthy and then you would return to Counsel table and discuss the possible plea be accepted by both of the defendants who you represented? A Not when you put it that way. There were conferences during the trial among all the lawyers.

Q Between you and the District Attorney? A Yes. Then after the conferences, I would communicate with the family and with the defendants, that's right.

Q Now, Mr. Fuschino, is it not a fact that the reluctance of the defendant Ciappetta to accept the plea was withdrawn, reluctance or desire, his reluctance to take the plea was finally beaten down, shall we say, by his parents, after their discussion with you as to your feelings

that he could possibly receive an Elmira Reception Center; that it would be a legal question? A I can't answer that question, whether it was beaten down by his parents.

Q Well, it took a good deal of talking between them, yourself and the defendant Ciappetta and yourself and his parents, before they finally, before it was finally agreed a plea would be taken? A There was a number of discussions.

Q Four, five, possibly six. A Quite a number, even more than that, between me and the family and between me and the defendant Ciappetta.

Q And during some of these conversations, were any members of the Guglielmelli family present, conversations you had with Ciappetta, with the family? A At times we were all together and at times I spoke to each family separately.

Q And at times your conversations with Frank Ciappetta, the co-defendant, Guglielmelli was present, is that right? A Yes, because they were both sitting together at the defendants' table.

Q And you did assure -- withdrawn. And is it now to the best of your recollection that you stated to Frank Ciappetta, whether to him, directly, or to Guglielmelli, in his presence, that you felt that if a plea was taken

to Murder in the Second Degree, that it would be possible for Judge Schulz to sentence him to Elmira Reception Center; that that sentence would be a legal sentence and would be upheld by the Correction Department? A I had told that to both of them.

THE COURT: Did I ever indicate that to you?

THE WITNESS: No, Your Honor.

MR. MILLER: No further questions.

MR. McCARTHY: No questions.

VINCENT GUGLIELMELLI, 425 East 115th Street, New York, New York, a witness called on behalf of the Petitioner Guglielmelli, having been first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. FRIEDMAN:

Q Vincent, you are one of the defendants in this case? A Yes, sir.

Q What is the date of your birth?  
A February 18th, 1939.

Q Now, you remember when you were arrested in this matter? A Yes, sir.

Q Who engaged an attorney on your behalf?  
A My family.

Q Well, whom, whom do you mean?

A My mother and my father.

Q And were you consulted as to what attorney you wanted? A No.

Q And do you remember when your parents told Mr. Fuschino they didn't want him to represent you any more?

A Yes.

Q How did you know your parents told Mr. Fuschino that? A Well, I first heard it in the courtroom when he came here, and then they told me like when they came to visit me.

Q Did you go along with everything that your parents did in the matter? A Yes, sir.

Q Do you remember there was some conversations between you and your parents and Mr. Fuschino before you entered a plea in the case? Do you remember that?

A Yes, sir.

Q Where did these conversations take place?

A Well, my parents talked to me in the county jail when they came to visit me, once in the side room.

THE COURT: Speak louder.

Q A little louder, please. A My family, that is, my parents talked to me in the county jail.

Q You were a prisoner in the county jail when your parents visited you there? A Yes, sir.

Q And did they have a conversation with you about your pleading guilty to Second Degree Murder? A Yes, sir.

Q When did that conversation take place? A Well, before I took the plea.

Q How long before? A I don't remember.

Q Was there more than one conversation? A Yes.

Q Do you remember what it was that your parents said to you and what you said to them? A Well, my mother told me if I took a plea to Murder in the Second Degree that I would get a five year maximum.

Q Your mother told you that? A She told me that the lawyer told her that because the judge was supposed to have gotten a letter from Elmira Reception Center saying that it was okay, and she told me like if we took the plea to Murder in the Second Degree, that I would get the five years.

Q Did you believe if you took a plea to Second Degree Murder you would get a five year sentence? A Yes,  
sir.

Q Well, do you remember at the time the plea was entered in court, weren't you asked was any promise or anything like that made to you? Do you remember that?

A Yes, sir.

Q And what did you say then? A Well, I really didn't say nothing, at least I don't remember.

Q But you believed you were going to get a five year sentence? A Yes, sir.

Q When you were sentenced to 20 years to life, did that come as a surprise to you? A Yes.

Q Well, did you speak up or say anything then? A Well, no, I didn't know what to say. I was surprised.

MR. FRIEDMAN: All right, that's all.

THE COURT: Any questions, Counsel?

MR. MILLER: No.

MR. McCARTHY: No questions.

CRISCENZA GUGLIELMELLI, 425 East 115th Street, New York, New York, a witness called on behalf of the Petitioner Guglielmelli, having been first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. FRIEDMAN:

Q Mrs. Guglielmelli, are you the mother of the defendant Vincent Guglielmelli? A Yes; I am.

Q And he was born on February 18th, 1939? A Yes.

Q You remember the circumstances relating to his arrest and the proceedings leading up to the trial? A Yes.

Q Mr. Fuschino represented him throughout those proceedings? A Yes.

Q Who engaged the services of Mr. Fuschino? A My husband did, and myself.

Q And during the time between your son's arrest and until the time when he was sentenced several months -- almost a year later, is that right? A Yes.

Q Did you have many conversations with Mr. Fuschino? A Yes.

Q Now, do you remember any conversations with Mr. Fuschino regarding what would happen if your son were to plead guilty to the charge? A Well, at first he had kept telling me in the beginning of the case, he kept telling me my boy would eventually be turned over to the Children's Court.

Q But that didn't happen? A No.

Q And you found that he was in this court? A Yes.

Q Charged with Murder? A Yes.

Q And then you continued to have conversations with Mr. Fuschino? A Yes.

Q Do you remember before -- before I go into the conversation with Mr. Fuschino, do you remember having a conversation with Mr. McCarthy, the gentleman seated at

my right? A Yes.

Q About when did that take place?

A On February 4th.

Q And -- A 1955.

Q Where did that conversation take place?

A In Mr. McCarthy's office.

Q Who was there? A Mr. Guglielmelli, myself and Mr. McCarthy. We met him in the corridor and I went over to him and told him I would like to speak to him, and he accompanied me to his office, my husband and I.

Q How long were you in his office?

A Maybe a half hour, 20 minutes.

Q And, just as well as you can recall, Mrs. Guglielmelli, will you please tell us just what you and Mr. Guglielmelli said and what Mr. McCarthy said, at this time, when you were in Mr. McCarthy's office?

MR. McCARTHY: This is February 4th.

MR. FRIEDMAN: Yes; she says February 4th.

A Well, the -- my purpose in wanting to see --

Q No, No, Mrs. Guglielmelli, don't tell your purpose. Just tell us what was said as well as you can. You are not permitted to say what your purpose was.

A Well, I went in to ask him something.

Q Just tell us what you asked him. A I went

in to ask him that being the case wasn't going to come up for a few months, at least, if he could do something to place my boy somewhere where he would get his schooling while the case was pending and when he was needed for trial, to have him brought back.

Q What did he say to that? A He says, "Mrs. Guglielmelli," he says, "You mean to tell me you are concerned about your boy going to school when you should be worried that he doesn't go to the electric chair?"

Q Then what else was said? Just tell us everything you can remember that was said that day. A So, I told him my boy didn't kill anybody. He says, "The act of one is the act of all." Then he was talking there. He says, "You know, I am in this business for 22 years, and I hold a record for sending the most people to the electric chair." He says, "There have been cases where I could stand up in court and hold the gun and pull the trigger and go home and have a good night's sleep," he says, "But in this case it is different." He says, "Your boy is so young," he says, then he started thinking out loud. He says, "In view of his tender years, and in this case is different, because of his extreme youth," he says, "If your boy pleads guilty to Second Degree Murder," he says, "The Judge would sentence him to a training school

or a vocational school, where when your boy is 21, he would come home and he will still be a young boy."

Q Yes, what did you say. A I says, "Second Degree." It sounded so bad to have my boy plead guilty to such a thing, and he said, "It is a freak of law, <sup>where</sup> there has been no provision made in the book where they could charge a boy of 15 with anything less than Second Degree Murder."

Q Yes. What else? A Well, I was so frightened when he kept talking about the electric chair, I was sorry I had gone in to see him.

Q Well, now, don't tell us about your thoughts, Mrs. Guglielmelli. Just tell us everything that you can remember about the conversation, what you or your husband said, or what Mr. McCarthy said. Have you given us everything that you remember about it? What did you say to Mr. McCarthy when he said, "We might be able to send the boy to a training school or a vocational school so that he will be out when he is 21." What was your response to that? A I didn't say anything, because I felt, I still felt my boy was going to go to Children's Court.

Q All right. Well, and that was, that's all you can remember about your conversation with Mr. McCarthy, is that right? A Yes.

Q Now, you had some conversations with Mr. Fuschino after that? A Yes.

Q Now, what were the conversations with Mr. Fuschino, as well as you can recall, that took place, you say between February and April of 1955. A Well, he always assured me that my boy, that the most my boy would receive, if he didn't go to Children's Court, that the treatment he would receive here in this court would be equivalent to the same that he would have gotten in the Children's Court.

Q Well, did you ask him what that was, or what it would amount to? A That he would be under jurisdiction until, jurisdictional custody until he was 21; that the maximum, that the worse that would happen to him, because of his tender years, was that they would send him away until he was 21.

Q Well, now, did there come a time when you and your husband decided to terminate Mr. Fuschino's representation of your son as attorney? A Yes.

Q About when was that, if you remember? A Either April 18th or the 19th. I don't remember clearly.

Q Did you and your husband have a conversation with Mr. Fuschino? A Yes.

Q Did you hear what Mr. Fuschino said about that conversation, on the witness stand, a little while ago? A I know he said he never told us, my boy wasn't going to get five years. I was listening to that.

Q I am asking you, did you hear Mr. Fuschino, what Mr. Fuschino said about your telling him you didn't want him to represent your son because he was representing another defendant? A Yes.

Q Is that correct? A Well, because he was representing another defendant and because he told us that this case would have never have gone to trial; that my boy would either be placed in Children's Court or that we would get an acceptable plea where the boy would receive a five year maximum and that would be the end of the case; that there would be no trial at any time.

Q So, what did you tell Mr. Fuschino? He said that Judge Sullivan wanted this case to go to trial. So, we felt as long as it was going to go to trial and he had one defendant in the case, to defend two boys it would be too much of a burden for him, and we wanted my boy to get individual attention.

Q So, did you tell him to tell the Judge that he did not represent Vincent any longer? A Yes.

Q And were you present in court when he told

the Judge that? A He came in the court and told the Judge.

Q All right, and the minutes show what happened in court, so I am not going to ask you about that. Well, you remember the Judge directed him to continue, under certain circumstances. A Yes.

Q And was that the only reason why you permitted Mr. Fuschino to continue in the case, it was because it was the direction of the Court? A Well, he had to defend the the boy because he was directed by His Honor, but we didn't want him, and we told him not to appear in court, and he said that he would be disbarred if he done that.

Q Well, now, let me ask you this: Do you remember one occasion when Mr. Fuschino showed you a letter which had been written to the Judge by Doctor Kendall of the Elmira Reception Center? A Yes, sir.

Q I show you this letter which is marked Petitioner's Guglielmelli A, for Identification, of this date, and ask you whether that is the letter which Mr. Fuschino exhibited to you some time shortly after the date which it bears. A Yes.

Q Do you remember reading that letter?  
A Yes. I didn't read the whole letter, but Mr. Fuschino

pointed out what he wanted me to see.

Q Did he show it to your husband at the same time?

A Yes.

Q Did you discuss the letter with him? A Yes.

Q What did you say to Mr. Fuschino and what did Mr. Fuschino say to you about that letter? A He says, "This is it; this is what we have been waiting for."

Q And so what did you say, or what else was said about it, if you remember? A Well, I don't remember too much, because I was so happy when he showed me the letter, and I knew that my boy was going to get a sentence of five year maximum, and I wasn't afraid any more.

Q And then when your son finally got the sentence of 20 years to life, did that come as a shock and surprise to you? A A shock. We were frozen. We never expected that, never.

Q May I ask you this. If you had known that your son was not going to get a sentence -- withdrawn. If you knew your son was going to get a sentence of more than five years, would you have consented to his pleading guilty? A No.

MR. McCARTHY: I object to that.

MR. FRIEDMAN: Don't answer until the --

THE COURT: I will permit her to answer,

MR. FRIEDMAN: That's all.

THE COURT: Any questions, Counsellor?

MR. MILLER: No questions.

MR. McCARTHY: No questions.

MR. FRIEDMAN: Now, if Your Honor pleases, I have the testimony of Mr. Guglielmelli which, in a sense, is cumulative. If Mr. McCarthy will stipulate Mr. Guglielmelli, the father of this defendant, if called, would testify to like effect, without necessarily conceding the truth of his testimony --

MR. McCARTHY: Exactly that, without conceding the truth thereof.

THE COURT: Of course, you have a little more now, Counsel. You have the day of the pleading, at which time the Court addressed certain questions to the father of this defendant.

MR. FRIEDMAN: Yes.

THE COURT: Indicative of the fact that the father of this defendant, in open court, consented that Mr. Fuschino represent this defendant for the purpose of sentence. Do you concede that?

MR. FRIEDMAN: Yes. May I ask Your Honor what page of the minutes Your Honor refers to?

THE COURT: Page 374, and I refer you to that part of the pleading minutes which indicate as follows: Court Officer Goldberger: Mr. and Mrs. Guglielmelli. (A man and a woman step forward) Are you following me?

MR. FRIEDMAN: I guess I am.

THE COURT: You are the parents of this young man? A woman: Yes, sir. The Court: What is your name, please, Madam? The woman: Crescenza Guglielmelli. The Court: And you are the father, sir? A man: Yes, sir. The Court: And what is your name? The man: Alfred. The Court: Where do you live? Mr. Alfred Guglielmelli: 425 East 115th Street. The Court: This young man is your son, is that correct? Mr. Alfred Guglielmelli: Yes, sir. The Court: You understand what is happening in this court now? Mr. Alfred Guglielmelli: Yes, sir. The Court: Your attorney has advised me that your son wishes to plead, with your consent, to Murder in the Second Degree, is that correct? MR. Alfred Guglielmelli: Yes, sir. The Court:

Are you satisfied that Mr. Fuschino represents you for the purpose of this plea in this court?

Mr. Guglielmelli: Yes, sir.

You concede that?

MR. FRIEDMAN: I am familiar with this, and I concede that took place but, of course, Your Honor, Your Honor understands that I take the position this must be viewed in the light of everything that went before.

THE COURT: I understand that, but you were conceding, or the District Attorney was, that the testimony of Mr. Guglielmelli would be the same as his wife. Well, his wife testified nothing about this plea situation.

MR. FRIEDMAN: No; I don't dispute anything that the minutes show, Your Honor, as far as the minutes being an accurate report.

THE COURT: Next witness.

MR. FRIEDMAN: That's all on behalf of the defendant Guglielmelli.

THE COURT: Are you ready?

MR. MILLER: Yes.

THE COURT: Just a moment.

(At 3:15 a recess was taken)

FRANK CIAPPETTA, 419 East 115th Street, New York, New York,  
a witness called on behalf of the Petitioner Ciappetta,  
having been first duly sworn, testified as follows:-

## DIRECT EXAMINATION BY MR. MILLER:

Q Frank, you were indicted charged with the crime  
of Murder in the 1st Degree, is that right? A Yes, sir.

Q And there were four other young men indicted  
with you and charged with the same crime? A Yes, sir.

Q And was Mr. Stephen Fuschine your lawyer?  
A Yes, sir.

Q And did he represent you from the time of your  
arrest until the time of your sentence, actually? A  
Yes, sir.

Q Now, were you ever in any trouble before this  
particular case? A No, sir.

Q Never appeared in any court before? A No, sir.

Q This is the first time you ever had a lawyer to  
represent you on any matter? A Yes, sir.

Q And how old are you now? A 18.

Q And when you were arrested, it was sometime  
last summer, the summer of 1954, is that right? A Yes,  
sir.

Q And how old were you at that time, the time of  
the arrest? A 17.

Q Now, from the time of your arrest until the time the case was called to trial, sometime in April, April 18th, 1955, did you have various discussions with Mr. Fuschino, your lawyer, regarding the case that they had pending against you? A During the trial I did.

Q But I mean prior to that you saw him once or twice? A Yes, sir.

Q And he talked to you about possible pleas and disposing of the case without a trial? A Yes, sir.

Q Nevertheless, there did come a time in the trial -- the trial came to pass, is that right, on or about April 18th or 19th, 1955? A Yes, sir.

Q Now, sometime shortly after the trial began/<sup>and</sup> the jury started to be picked, did Mr. Fuschino talk to you about a letter which he had received or which the Judge had received from Elmira Reception Center? A Yes, sir.

Q Do you remember when this first time he spoke to you, the first conversation about the letter? A It was during when we were at the table there.

Q Counsel table during recess, either before or after the court began, is that right? A Yes, sir.

Q And do you remember whether or not you ever saw the letter, read the letter? A No, sir.

Q But he, Mr. Fuschino, told you about the letter? A Yes, sir.

Q Now, did he tell you or let you know that the letter specifically mentioned the name Guglielmelli, and did it mention your name? A No, sir.

Q You never knew that, you just knew about this letter from Elmira Reception Center? A Yes, sir.

Q Now, in your conversations with Mr. Fuschino, at counsel table, during the trial, will you tell the Court just what on any one of these, or as many of these occasions as you can remember, just what Mr. Fuschino said to you about taking the plea and about possible sentence? A He told me that, to take the plea to Murder Two, and I told him I wouldn't, and he kept saying that then he come up with instead of a five year possible sentence, the max, and then that's all he said.

Q And you say at first you didn't want to take the plea of Murder in the Second Degree? A No, sir.

Q You said, "No," is that right? A That's right.

Q What made you change your mind and finally accept the plea? A Because he told me about the five year sentence.

Q Well, did you talk to your parents during this period of time about the sentence or the possible sentence and the plea and the taking of a plea? A Mr.

Fuschino or me?

Q Did you talk to your parents about it?

A Yes, sir.

Q And, well, what did your parents, your mother and father tell you regarding the taking of the plea or any recommendations they had? A Well, they told me, they says -- no, it was after I took the plea, they said that, "You might get the five years," something like that.

Q Well, before you took the plea, did anybody at any time tell you about the five years or that you would get five years or there is a possibility of your getting the five years if you took the plea? A Mr. Fuschino.

Q He said to you there was this possibility?

A Yes.

Q Are you sure of this now? A Yes, sir.

Q Now, would you have taken the plea to Murder in the Second Degree if you hadn't been given hope, if you hadn't been told by Mr. Fuschino that you could have, that you might get this five year sentence at Elmira Reception Center? A No, sir.

Q He never said five years, what he said was a maximum of five years in the Reception Center, is that what he said? A Yes, sir.

Q He was always talking about Elmira Reception Center? A Yes, sir.

Q Or was he talking about time?

A Five years, Elmira Reception Center.

Q You know what Elmira Reception Center is?

A Yes, sir.

Q Would you have taken the plea to Murder in the Second Degree if you hadn't been told by Mr. Fuschino that you could get this sentence to Elmira Reception Center for five years? A No.

Q After you were sentenced and sent away -- you were sentenced on June 24th, 1955, is that right?

A Yes.

Q And you were held in the Bronx City Prison for a while? A Yes.

Q And where was the first place they sent you to, Elmira Reception Center? A Yes.

Q On June 15th, 1955, did you send a letter to your mother, Mrs. Betty Ciappetta? A Yes, sir.

Q I show you this letter and ask you if you remember having sent this to your mother. A Yes.

Q And that is the letter you sent to your mother?

A Yes, sir.

Q This is the original in your handwriting?

A Yes, sir.

MR. MILLER: At this time, Your Honor,  
I ask this original be marked for identification.

(Document marked Defendant Ciappetta's  
Exhibit 1, for Identification)

THE COURT: Go ahead, counsel.

MR. McCARTHY: I don't think it is necessary  
to read this particular letter, Judge, because  
Counsellor has assured us it is the original  
letter, copies of which having been filed with  
the application, and they are photostatic copies  
of that letter. This is the original of the  
photostat.

MR. MILLER: That's right.

MR. McCARTHY: So they are part of the  
record.

Q All I ask at this time is you read this letter  
over, because I am going to ask you some questions about  
it. A Loud?

Q No, to yourself.

THE COURT: Did you read it? Did you  
read it?

THE WITNESS: Yes, sir.

Q I ask you if this letter states your true feelings  
or states the true feelings you had at the time you took

the plea, at the time you were sentenced, regarding your belief that you were going to get the five years? A Yes, sir.

Q And it states how you, that your parents told you you would get the five years, is it right? A Yes, sir.

Q It was upon their assurance after the discussions with Mr. Fuschino, you were going to get the five years, that you took the plea? A Yes, sir.

MR. MILLER: I think Mr. McCarthy stated that, for the record, this letter is amongst the various papers.

THE COURT: Yes.

MR. MILLER: No further questions.

THE COURT: Any questions?

MR. McCARTHY: No questions.

THE COURT: Step down.

BESSIE CIAPPETTA, 419 East 115th Street, New York, New York, a witness called on behalf of the defendant Ciappetta, having been first duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. MILLER:

Q Mrs. Ciappetta, are you the mother of Frank Ciappetta, the last witness in this case? A Yes, sir.

Q And did you retain Mr. Stephen Fuschino as the attorney for your son to represent him at his murder case, the indictment against him? A Yes.

Q Now, sometime in April, 1955, April 19th, approximately, the trial started in the action, is that right? A Yes.

Q And they started to pick the jurors? A Yes.

Q You were in court each and every day during that time? A Yes.

Q And at those, during the days that you were sitting here in court and the jury was being picked, did there come occasions, or were there occasions you had to speak to Mr. Fuschino? A Yes.

Q About the case, and the possible pleas?

A Yes.

Q Were there occasions you spoke to all of the attorneys and the parents of all of the boys out in the hall about a possible plea in the case? A Yes.

Q Now, in your discussions with Mr. Fuschino, regarding sentence, will you please tell the Court what Mr. Fuschino, to the best of your recollection, what he told you regarding the sentence that your boy would get if he pled to Murder in the Second Degree? A Mr. Fuschino told me a letter was sent up to Elmira and all

the boys will get five years. One boy didn't want to plead.

Q Who was that boy? A Mr. Petrucci.

MR. MILLER: P-E-T-R-U-C-C-I.

A He didn't want to plead on the five years because he says that they wouldn't get five years, but all the boys --

Q Just a moment.

MR. McCARTHY: Just so we can get our records straight, the witness has said Petrucci, and I assume she means the fifth defendant in the case, Frank Giampetrucci, G-I-A-M-P-E-T-R-U-Z-Z-I.

MR. MILLER: It is so agreed that that's the person.

A That his mother didn't want him to plead on First Degree Manslaughter because they wouldn't get five years, but the boys, the five boys were together, they convinced Frank Petrucci to plead, so the boy took the plea that day when the trial --

Q In other words, is it your understanding that it was because of the statements made to the boys by their attorneys that they were sure or they felt pretty certain about getting the five years, that they even

went so far as to gang up, shall we say, on Giampetrucci?

A Yes.

Q Because he was holding out and he didn't have faith in that five years? A That's right; he didn't want to.

Q And were you actually convinced, in your mind, from your conversations with Mr. Fuschino, that your son would get five years maximum, to be sent to Elmira Reception Center? A I really believed he would have got five years in Elmira.

Q Did you talk to your son about taking the plea?

A Yes.

Q And was he reluctant about taking the plea?

A He took the plea because he thought he will get five years.

Q I mean, did you have to talk him in to taking the plea? A No; I left it up to him, and he, and he took it.

Q Did you receive that letter? A Yes.

Q That's marked Petitioner Ciappetta's Exhibit A, for Identification, did you receive this letter that is dated July 15th, from your son? A Yes.

Q And the statements that your son made in those letters, or the statements he makes in that letter, is

that the truth? A Yes.

Q As far as you convincing him to take the plea?  
A I told him.

Q You told him he would get the five years?  
A Yes.

Q And your opinion was based upon what you had been told by Mr. -- A That's right.

Q -- Fuschino? A That's right.

MR. MILLER: No further questions.

THE COURT: Anything, Counsel?

MR. McCARTHY: No.

THE COURT: Step down, Madam.

Is that your case?

MR. MILLER: Yes.

MR. McCARTHY: I'd like to question, if I may, the defendant Guglielmelli, just a couple of questions.

THE COURT: Any objection?

MR. FRIEDMAN: No, Your Honor.

VINCENT GUGLIELMELLI, resumes:-

CROSS EXAMINATION BY MR. McCARTHY:

Q When had you decided to enter, to take the plea to Murder in the Second Degree? A Well, I really never decided. I left it up to my parents.

Q Well, you did finally take the plea, your parents didn't take it. You took the plea, isn't that so? A Yes, sir.

Q And when did you decide to take it? A Well, I really never decided to take it. I just went along with my parents.

Q But you did, as a matter of fact, take the plea, didn't you? A Yes, sir.

Q Well, let's put it this way: When did your parents first tell you to take the plea to Murder in the Second Degree? A They told me like about the letter, and Mr. Fuschino says that the Judge, and I think it was even you, agreed I would get five years max if I took the plea.

Q You didn't talk to me about the sentence, did you? A Not me, but Mr. Fuschino was supposed, I think. I think he talked to you and the Judge.

Q All right. Now, you say that they talked to you about the letter. You refer now to the letter which we have marked A, for Identification, for the Petitioner Guglielmelli, the letter from the man up in Elmira, the Warden in Elmira, is that right, addressed to the Judge? Is that the letter you are referring to? A Yes, sir.

Q And it was based on that letter Mr. Fuschino was

telling your parents that you might get such a sentence, is that right, or that you would get such a sentence, is that right? A Yes, sir.

Q Was there anything else your parents said?

A Well, what do you mean?

Q Well, about the, that made them tell you to take the plea to Murder in the Second Degree, outside of this letter. A Well, she told me, like my mother, told me when she went to your office about seeing about me going back to school.

Q When did she tell you that? A I don't remember.

Q Was this before the trial started or after the trial started? A Before the trial started.

Q How long before the trial started?

A I can't remember.

Q Did your mother tell you, in view of what I, what she related to you that I told her, that you should take the plea then? A Well, she told me, my mother told me about taking the plea after we went on trial, like we were going on trial.

Q Just so we can get this record straight, did your mother or father ever tell you to take this plea before the case actually started to trial, which was on

April 18th or April 19th of this year? A No, sir.

Q They never influenced you or tried to persuade you to take a plea to Murder in the Second Degree, did they, before that date? A I don't remember, like we were going on trial, and then I am almost positive while we were going on trial, that they told me about the letter and everything, and that they wanted me to take the plea.

Q And is it the best of your recollection that that conversation that your parents had with you took place after the trial started, which would be on April the 18th or 19th? A Yes, sir.

Q Now, what did they say about a conversation that they had, they allegedly had with me? A Well, my mother told me that, she told me before we went on trial about the conversations she had with you.

Q This was a conversation you had with your mother before you went to trial? A Yes, sir.

Q When was that? A I can't, I really can't remember the exact date.

Q It is hard to remember exact dates, but was it a week, two weeks, a month, two months? A I can't remember.

Q What did she say? A Well, she told me she, like we had gone to court, I think, and she asked the

lawyer if it would be all right if she went and talked to you. He said, "Okay," and she went into see you, and she was asking you about school, because I was missing a lot of school work while I was in the county, and then you told, "You worried about your son going to school, you got to worry about him going to electric chair," and you said if I took a plea to Murder in the Second Degree, I would get a five year max.

Q You would get a five year max? A That's right.

Q You don't remember/she had this conversation with you? A Well, I remember it was before the trial, before the trial.

Q Was it two months before the trial?

A I can't remember.

Q Well, whenever it was, did your mother then say to you, "As long as Mr. McCarthy says you are going to get out in five years or less, you take this plea." Did she say that to you? A No; she didn't tell me then, but she told me like after going on trial I should take the plea, in here.

Q I am afraid the record is not straight. It certainly is confusing in my mind. When did your mother relate this conversation she allegedly had with me?

When did she relate it to you, before or after the trial started? A Before the trial.

Q And you don't remember how long before the trial? A No.

Q Whenever it was, did she then tell you to take the plea to Murder in the Second Degree? A No; she told me the day we took the plea, my father and my mother, they came to see me back in the hall, and they told me that I was going to take a plea and everything was like all right, and I was going to get a five year max.

Q That conversation was based upon this letter you refer to, a letter that they got from a man up in Elmira, referring to Petitioner's Exhibit A, for Identification, on behalf of Petitioner Guglielmelli, isn't that so? A Well, I mean, from what they told me, it was based on that and the conversation they had with Mr. McCarthy.

Q Was that the second time they made reference to the conversation they had with me, allegedly? A Yes, sir.

Q So they mentioned that to you twice, is that so? A Well, a few times they were always telling me like everything was going to be all right, and they mentioned you a few times to me.

Q This is your testimony, is it, that sometime before this trial began in April, your parents told you of a conversation they had with me, allegedly, in which I told them that if you took a plea to Murder in the Second Degree you would get not more than five years?

A Yes, sir.

Q And even having been told that, you went on with this trial, is that so? A Well, it really wasn't supposed to go all the way, the trial. We weren't supposed to go to trial.

Q You weren't supposed to go to trial? A No.

Q Weren't you on trial here, as a matter of fact, from April 18th up to May 2nd, and didn't you take your pleas on May 2nd? A Yes, sir; I think it was.

Q That's on trial two or three weeks.

A I am talking about before the trial, because Mr. Fuschino kept telling me he was going to get me in juvenile court.

Q Were you relying upon this conversation that your mother had with you concerning the conversation they had with me? Is that what you relied upon to take your plea to Murder in the Second Degree? A No, sir; I was relying upon that there, and the letter, too, and what Mr. Fuschino was telling me.

Q Because after your mother told you, as you say, that you could get out with a five year sentence, that I told her that, you did not take any plea; you went on with the trial, isn't that so? A Well --

Q Isn't that so? You started a trial on April 18th and 19th, didn't you? A Yes, sir.

Q And that was sometime after your mother told you, as she stated here this afternoon, of a conversation she allegedly had with me, isn't that so? A Yes, sir.

MR. McCARTHY: No further questions.

THE COURT: Step down.

MR. McCARTHY: I want to take the stand in this matter, Judge.

ANDREW C. McCARTHY, Esq., Assistant District Attorney, Bronx County Court, a witness called on behalf of the People, having been first duly sworn, testified as follows:-

THE WITNESS: Shall I proceed in question and answer form?

MR. FRIEDMAN: He may, if he likes to, in narrative form.

THE WITNESS: I was present in court this afternoon and I heard the testimony of Criscenza Guglielmelli, the mother of the Petitioner, Guglielmelli, which testimony reiterates

a statement she made in an affidavit in support of this petition, in which she states that she was present in my office on February 4th and had a conference with me, at which time she and her husband and Mrs. Ciappetta were present, and that, in words or in substance, I told her that if her son, the Petitioner Vincent Guglielmelli, would plead guilty to Murder in the Second Degree, the Judge could arrange it upon sentence, in view of the boy's age, so that the boy would be released from prison when he was 21, which would be in about five years, and I believe she so testified to that same matter here, substantially, today. I categorically deny that I made such a statement to Mrs. Guglielmelli or to her husband or Mrs. Ciappetta. Also her statement to me where she testified today I had stated I had sent some people, or so many people, or a record number of people to the electric chair, I deny making such a statement to her.

THE COURT: Any questions, gentlemen?

CROSS EXAMINATION BY MR. FRIEDMAN:

Q Mr. McCarthy, did she say she was concerned about her son missing school? A Yes, sir.

Q Did you say, in words or substance, "You shouldn't be worried about school, your son may be facing the electric chair." A I said to her, "I am surprised,"

if I can recall it correctly, "I am rather surprised you are so much concerned about his schooling when he is facing a serious crime of this kind, where he might face execution in the electric chair."

Q Now, both of the parents were present at the time this conversation took place? A Frankly, I don't recall the conference at all. Having seen Mrs. Guglielmelli this afternoon here, I do remember talking to that lady. I also remember talking to Mrs. Ciappetta. Maybe if I saw their husbands, I would recall talking to them. I don't deny for a minute that they were in my office and that we had conferences. I think I spoke to the parents of all of these defendants at one time or another. I do recall talking to some of them in my office, but actually recalling the exact conference itself, I can't say I recall it.

Q You are not sure of the exact date? A No; I am not sure of the date nor the time nor the circumstances but I wouldn't doubt for a minute I had such a conversation, that is that I had such a conference with the lady.

Q Your impression is that it was later than February, is that it? A No; I don't really know. The date given here in the affidavit is February 4th. If she said that was the date, I have no doubt, I wouldn't question

it. It could be before; it could be after it. I just don't remember.

Q Did you discuss the law with Mrs. Guglielmelli?

A No, Counsellor, because at that time we had not reached this point that we have been discussing here as to the change in the law, 218 $\frac{1}{4}$ a of the Penal Law. That only came up during the trial.

Q Well, during the trial did you discuss the law with Mrs. Guglielmelli? A No; I don't ever recall discussing it with her.

Q Did you ever tell the parents of this defendant Guglielmelli that there was some uncertainty about the law that was applicable to this case? A I don't remember having any discussions with them, but if I did, and I did discuss it with them, I wouldn't deny that I did. I just don't recall having it.

Q Well, just let me point this out to you, Mr. McCarthy: Don't think for a minute I am challenging --

A Go right ahead.

Q Because I know you are giving your best recollection. You stated in your affidavit, did you not, Mr. McCarthy, and I now quote, and this is your affidavit sworn to August 1st, 1955, in opposition to my present pending application: "Your dependent was very careful to

point out to the parents of the defendant petitioner that the interpretation of these sections was not at all clear; that letters were being written to the Attorney General and to the Correction Department for clarification." Do you remember that statement in your affidavit? A Yes, and I think that's correct, I think I had had a talk with them in the corridor, and if I am not mistaken, some clergymen came with them. That was during the trial.

Q All right. So, there was some discussion about the law that was applicable. Now you recall it, that I bring it to your attention? A Yes, Counsellor; that's correct.

Q And as you reconstruct your state of mind at the time of these discussions, there was some uncertainty as to the law, was there not? A There was, there was a discussion about it.

Q You imparted that feeling of uncertainty as to the applicable law to the parents of these boys? A I told the parents, in substance, there was a conversation going on mainly between Mr. Fuschino and Mr. Lee of our office concerning the interpretation of this Section 2184a. I was not in on it. Mr. Lee was looking up the law, and I did tell the parents that there was such a discussion going on, and there was some uncertainty as to the

interpretation of the statute.

Q And did you see this letter from Doctor Kendall at the time it was received? A I don't think I ever saw the letter. I may have, but I don't recall seeing it.

Q And did you have conversations with Judge Schulz and Mr. Fuschino regarding the contents of this letter?

A I don't think I did. I think Mr. Lee carried on those conversations. .

Q Did Mr. Lee communicate to you the contents or substance of the letter from Doctor Kendall? A Yes; I think he did. I had a talk with Mr. Lee and he talked to me about these letters, and he kept me abreast of what was going on.

Q Do you know whether Mr. Lee agreed with Doctor Kendall that the defendant Guglielmelli was eligible for reception up there? A I don't think Mr. Lee either agreed or disagreed with him. I think Mr. Lee was looking forward to a clearer and more definite interpretation and definition of the law.

THE COURT: Let me clear something in all our minds. Doctor Kendall in his letter doesn't agree it can be done. He surmises it can be done. He suspects that it might be done, but he doesn't indicate at all that he is confident that

it can. In fact, he expresses grave doubts as to whether or not these boys, if they would have been sentenced, would not be returned.

MR. FRIEDMAN: Of course, as Your Honor knows, and as I know, the letter speaks for itself, and any characterization we make doesn't change its tenor, but I do want to direct Your Honor's attention --

THE COURT: You needn't. I have read it time and again.

MR. FRIEDMAN: All right.

Q Anyhow, did you and Mr. Lee discuss the statement made that Doctor Kendall/in the letter, "It is my opinion the commitment here would be legal." A I don't think so. If we did, I don't recall it.

MR. FRIEDMAN: All right, that's all.

THE COURT: Is that all, gentlemen?

MR. McCARTHY: I have no other witnesses.

THE COURT: Is that all?

MR. FRIEDMAN: That's all, Your Honor.

Might I have Your Honor's permission to have a reasonable time to submit a brief on some points of law which I think have arisen?

THE COURT: How long do you want?

MR. FRIEDMAN: May I have a week from Monday? That is ten days.

THE COURT: Make it two weeks.

MR. FRIEDMAN: Well, two weeks, and I will serve the District Attorney.

MR. MILLER: Likewise myself submitting a brief, Your Honor.

THE COURT: Matter adjourned.

(At 4:00 p.m. the hearing was adjourned)

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This is to certify that the foregoing is a true and accurate transcript of the minutes.

John P. Cullen  
John P. Cullen  
Official Court Reporter

People v. Frank Ciapetta.

SCHULZ, J.

The defendant pleaded guilty to murder, second degree on May 2nd, 1955 under an indictment charging murder, first degree. In his petition, the defendant urged that the conviction aforesaid and the ensuing judgment on June 24th, 1955, be vacated and set aside on the ground that they were procured upon the misrepresentation of his counsel and the district attorney that he would receive a reformatory sentence not exceeding a maximum of five (5) years, whereas, a term of imprisonment of twenty (20) years to life was imposed upon him by this Court.

At the hearing, the defendant testified, however, that he was persuaded to plead guilty solely on the representation of his trial counsel that there was a possibility of his receiving a reformatory sentence. His counsel testified in the same tenor. Although not at issue, this Court, nonetheless, makes a finding that no fraudulent representation was made by the district attorney to induce the guilty plea of the petitioning defendant. The corroborated evidence adduced at the hearing, that the challenged conviction resulted from a statement made to the defendant by his then counsel of a possible reformatory sentence, is legally insufficient to invoke the remedial process of coram nobis. The prediction of counsel, as to the length of imprisonment, that was made to the defendant to influence his guilty plea, even if erroneous,

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forms no basis for relief under coram nobis (Pee. v. Moore, 284 A.D. 925; Pee. v. King and Green, 284 A.D. 1015; Pee. v. Neil, 281 A.D. 1055; Pee. v. Wilkes, 136 N.Y.S. 2nd 662. Motion denied.

Dated:

---

COOK JUDGE

COUNTY COURT  
COUNTY OF BRONX

Indictment 640-54

The People of the State of New York

Against Motion to Vacate Judgement of  
Frank Ciappetta Conviction.

Present: hon. Eugene G Shulz/

Upon the fore going papers this motion is in all respects denied  
The defendant moves for the vacate of a judgement rendered upon  
his plea ~~of~~ guilty to Murder in the Second degree under a  
indictment charing Murder first Degree.  
Thus committing him by this court on June 24 1955 to the Elmira Recep-  
tion Center for a term of Twenty Years to Life.

Reception Center for a term of Twenty Years to Life.

As grounds for this relief the defendant urges that he was induced to plead guilty on the misrepresentations of his trial counsel and the District Attorney that he would receive a reformatory sentence with a five year maximum imprisonment and further that rights were prejudiced when the court refused to permit his counsel who was also appearing as retained counsel for another defendant on the same indictment to withdraw as counsel for such co-defendant and thereby preventing this counsel of giving his undivided attention to the defense of the moving defendant.

undivided attention to the defense of the moving defendant. It appears that this defendant previously moved this court for a similar relief base on a claim of fraud leveled against the District Attorney and his trial counsel in procuring his guilty plea by promising him a reformatory sentence.

A hearing was accorded him at which time, testifying on his own behalf he withdrew the charge against the prosecutor and asserted that he pleaded guilty solely on the misrepresentations of his trial counsel as to the length of the imprisonment that would be imposed upon him. The defendant application was denied on December 6, 1955, with a opinion which no appeal was prosecuted by this defendant.

In view thereof there is no requirement of a second hearing on the same issue here to fore disposed of. (Pec. vs Sullivan 4 N.Y.2nd.473) No need for a hearing on the complaint of deprivation of effective legal assistance which this court finds without any merit.

(Pee. vs. Tomaselli 7 N.Y.2nd.350)

(Pee. vs. Brown 7, N.Y. 2nd. 359)

Eugene G. Shulz

April 19, 1960.

Bronx County Court

COUNTY COURT  
COUNTY OF BRONX

A 155

THE PEOPLE OF THE STATE OF  
NEW YORK

against

FRANK CIAPETTA

Defendant

SIRS:

PLEASE TAKE NOTICE, that the defendant hereby appeals to the Appellate Division of the Supreme Court, First Department, from an Order of Hon. EUGENE G. SCHULZ, entered in the Office of the Clerk of the County Court, Bronx County, on or about the 6th day of December 1955, denying defendant's motion to vacate judgment of conviction herein and from each and every part of said order and from the whole thereof.

Dated, New York, January 13, 1956.

Yours, etc.

FREDERICK J. MILLER  
Attorney for Defendant  
320 Broadway  
New York 7, N.Y.

TO Hon. Daniel V. Sullivan  
District Attorney's Office  
851 Grand Concourse  
Bronx, New York

Clerk of County Court  
851 Grand Concourse  
Bronx, New York

EXHIBIT A

----- X  
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

FRANK CIAPETTA,

Defendant-Appellant.

----- X  
State of New York )  
County of New York) ss:

FREDERICK J. MILLER, being duly sworn, deposes and says:

That I am the attorney for the Appellant and am fully familiar with all the facts and circumstances herein.

That the father of the Appellant passed away some time in the Spring of 1956 shortly after your deponent filed the Notice of Appeal, and the family is without funds of any sort whatsoever, however, your deponent will continue with the appeal without receiving a fee.

There is a co-defendant of the Appellant, one VINCENT GUGLIELMELLI, who is represented by JACOB W. FRIEDMAN, Esq., 170 Broadway, New York City, who is appealing from the same order and it is my understanding that the argument of that appeal is on the calendar for the January 1957 Term of this Court.

Your deponent is of the opinion that the facts, circumstances and law are identical in both appeals and your deponent has discussed this matter with the Appeals Bureau of the District Attorney's Office: Bronx County and it has been agreed by and between us that the decision of the case of VINCENT GUGLIELMELLI shall be binding upon the Appellant herein.

-2-

WHEREFORE, deponent respectfully prays that the time of the Appellant be enlarged, and this appeal be set down for a hearing at the same time as the case of VINCENT GUGLIELMELLI.

Sworn to before me this

24<sup>th</sup> day of November, 1956  
*John J. Doyle*  
Notary Public, State of New York  
Qualified in Bronx County  
Commissioned March 20, 19

*John J. Doyle*

NEW YORK SUPREME COURT  
APPELLATE DIVISION : FIRST DEPARTMENT

A 158

----- X  
THE PEOPLE OF THE STATE OF NEW YORK.

Respondent.

-against-

FRANK CIAPETTA.

Defendant-Appellant.

----- X  
SIR:

PLEASE TAKE NOTICE. that upon the annexed affidavit of FREDERICK J. MILLER. sworn to the 4<sup>th</sup> day of January. 1957, and upon the notice of appeal herein. a copy of which is annexed hereto. and upon all the proceedings heretofore had herein. the undersigned will move this Court at the Court-house thereof. 25th Street & Madison Avenue. Borough of Manhattan. City of New York. on the 15th day of January. 1957. at 1 o'clock in the afternoon of that day. or soon as counsel can be heard. for an order enlarging the time of the defendant -appellant in the above entitled action to perfect his appeal and bring the same on for argument until the April. 1957. Term of the Appellate Division. First Judicial Department. and for such other and further relief as to the Court may seem just and proper.

Dated: New York. New York  
January 4<sup>th</sup>. 1957

Yours, etc..

TO: HON. DANIEL V. SULLIVAN  
District Attorney. Bronx County  
Attorney for Respondent  
County Court House  
Bronx, New York

FREDERICK J. MILLER  
Attorney for Defendant-Appellant  
320 Broadway  
New York 7. New York

NEW YORK SUPREME COURT  
APPELLATE DIVISION : FIRST DEPARTMENT

----- X  
THE PEOPLE OF THE STATE OF NEW YORK.

Respondent.

ONLY COPY AVAILABLE

-against-

FRANK CIAPETTA,

Defendant-Appellant.

----- X  
State of New York )  
County of New York) ss:

FREDERICK J. MILLER, being duly sworn, deposes and says:

I am the attorney for defendant-appellant, and I am familiar with the prior proceedings and submit this affidavit in support of defendant-appellant's motion for enlargement of time to argue appeal and for other appropriate relief.

On or about January 13th, 1956, defendant herein appealed from an order of the HON. EUGENE G. SCHULZ, entered in the office of the Clerk of the County Court, Bronx County, on December 6th, 1955, denying his motion to vacate a judgment convicting him of the crime of murder in the second degree and sentencing him for a period of from 20 years to life. A copy of the notice of appeal is hereto annexed and marked Exhibit A.

I have communicated and had many conversations with Jacob W. Friedman, Esq., attorney for Vincent Guglielmelli, defendant-appellant, who is appealing from the same order and it is my understanding that the argument of Guglielmelli's appeal was to be noticed for the January, 1957, Term of this Court.

Four defendant is of the opinion that the facts, circumstances and law are identical in both appeals and I have discussed this matter with the Appeals Bureau of the District Attorney's Office, Bronx County and it has been agreed by and

between us that the decision of the case of Vincent Gugliel-melli shall be binding upon the appellant herein. I was also informed by the Appeals Bureau that Mr. Friedman has not as yet perfected his appeal for the January, 1957, Term. That the time within which to perfect and argue this appeal has expired, the expiration date being the 2nd day of January, 1957. That the delay has not been intentional or due to lack of diligence, as I intended to rely upon Mr. Friedman to effectuate this appeal which is taken in good faith, and rely upon the outcome of that decision as the one binding on the appellant herein. That the people are not prejudiced by the delay inasmuch as defendant-appellant is presently serving the prison sentence imposed upon him.

I have not received any fee for the handling of this appeal, and am rendering this service without remuneration.

WHEREFORE, it is respectfully prayed that the defendant-appellant's time within which to perfect his appeal be enlarged until the April, 1957, Term of this Court, or to the same time when the case of VINCENT GUGLIELMELLI will be heard for argument.

Sworn to before me this  
4th day of January, 1957

ARTHUR SIEGEL  
Notary Public, State of New York  
No. 03-3657710  
Qualified in Bronx County  
Commission Expires March 30, 1957

FJ FREDERICK J. MILLER

NEW YORK SUPREME COURT  
APPELLATE DIVISION : FIRST DEPARTMENT

A 161

----- X  
THE PEOPLE OF THE STATE OF NEW YORK.

Respondent.

-against-

FRANK CIAPETTA.

Defendant-Appellant.

----- X  
S I R:

PLEASE TAKE NOTICE. that upon the annexed affidavit of FREDERICK J. MILLER. sworn to the 4th day of January. 1957, and upon the notice of appeal herein. a copy of which is annexed hereto. and upon all the proceedings heretofore had herein. the undersigned will move this Court at the Court-house thereof, 25th Street & Madison Avenue. Borough of Manhattan. City of New York. on the 15th day of January. 1957. at 1 o'clock in the afternoon of that day. or soon as counsel can be heard. for an order enlarging the time of the defendant-appellant in the above entitled action to perfect his appeal and bring the same on for argument until the April. 1957. Term of the Appellate Division. First Judicial Department. and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York  
January 4th 1957

Yours, etc..

FREDERICK J. MILLER  
Attorney for Defendant-Appellant  
320 Broadway  
New York 7, New York

O: HON. DANIEL V. SULLIVAN  
District Attorney. Bronx County  
Attorney for Respondent  
County Court House  
Bronx, New York

COUNTY COURT  
COUNTY OF BRONX

THE PEOPLE OF THE STATE OF  
NEW YORK

against

FRANK CIAPETTA

Defendant

SIRS:

PLEASE TAKE NOTICE, that the defendant hereby appeals to the Appellate Division of the Supreme Court, First Department, from an Order of Hon. EUGENE G. SCHULZ, entered in the Office of the Clerk of the County Court, Bronx County, on or about the 6th day of December 1955, denying defendant's motion to vacate judgment of conviction herein and from each and every part of said order and from the whole thereof.

Dated, New York, January 13, 1956.

Yours, etc.

FREDERICK J. MILLER  
Attorney for Defendant  
320 Broadway  
New York 7, N. Y.

TO Hon. Daniel V. Sullivan  
District Attorney's Office  
851 Grand Concourse  
Bronx, New York

Clerk of County Court  
851 Grand Concourse  
Bronx, New York

EXHIBIT "A"

NEW YORK SUPREME COURT  
APPELLATE DIVISION : FIRST DEPARTMENT

----- x A 163

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

FRANK CIAPETTA,

ONLY COPY AVAILABLE

Defendant-Appellant.

----- x  
State of New York )  
County of New York) ss:

FREDERICK J. MILLER, being duly sworn, deposes and says:

That I am the attorney for the Appellant and am fully familiar with all the facts and circumstances herein.

That the father of the Appellant passed away some time in the Spring of 1956 shortly after your deponent filed the Notice of Appeal, and the family is without funds of any sort whatsoever, however, your deponent will continue with the appeal without receiving a fee.

There is a co-defendant of the Appellant, one VINCENT GUGLIELMELLI, who is represented by JACOB W. FRIEDMAN, Esq., 170 Broadway, New York City, who is appealing from the same order and it is my understanding that the argument of that appeal is on the calendar for the January 1957 Term of this Court.

Your deponent is of the opinion that the facts, circumstances and law are identical in both appeals and your deponent has discussed this matter with the Appeals Bureau of the District Attorney's Office: Bronx County and it has been agreed by and between us that the decision of the case of "T GUGLIELMELLI shall be binding upon the Appellant herein.

NEW YORK SUPREME COURT  
APPELLATE DIVISION : FIRST DEPARTMENT

----- X  
THE PEOPLE OF THE STATE OF NEW YORK.

Respondent.

-against-

FRANK CIAPETTA.

Defendant-Appellant.

----- X  
State of New York )  
County of New York) ss:

FREDERICK J. MILLER, being duly sworn, deposes and says:

I am the attorney for defendant-appellant, and I am familiar with the prior proceedings and submit this affidavit in support of defendant-appellant's motion for enlargement of time to argue appeal and for other appropriate relief.

On or about January 13th, 1956, defendant herein appealed from an order of the HON. EUGENE G. SCHULZ, entered in the office of the Clerk of the County Court, Bronx County, on December 6th, 1955, denying his motion to vacate a judgment convicting him of the crime of murder in the second degree and sentencing him for a period of from 20 years to life. A copy of the notice of appeal is hereto annexed and marked Exhibit A.

I have communicated and had many conversations with Jacob W. Friedman, Esq., attorney for Vincent Guglielmelli, defendant-appellant, who is appealing from the same order and it is my understanding that the argument of Guglielmelli's appeal was to be noticed for the January, 1957, Term of this Court.

Your deponent is of the opinion that the facts, circumstances and law are identical in both appeals and I have discussed this matter with the Appeals Bureau of the District Attorney's Office, Bronx County and it has been agreed by and

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between us that the decision of the case of Vincent Gugliel-melli shall be binding upon the appellant herein. I was also informed by the Appeals Bureau that Mr. Friedman has not as yet perfected his appeal for the January, 1957. Term. That the time within which to perfect and argue this appeal has expired, the expiration date being the 2nd day of January, 1957. That the delay has not been intentional or due to lack of diligence, as I intended to rely upon Mr. Friedman to effectuate this appeal which is taken in good faith, and rely upon the outcome of that decision as the one binding on the appellant herein. That the people are not prejudiced by the delay inasmuch as defendant-appellant is presently serving the prison sentence imposed upon him.

I have not received any fee for the handling of this appeal, and am rendering this service without remuneration.

WHEREFORE, it is respectfully prayed that the defendant-appellant's time within which to perfect his appeal be enlarged until the April, 1957. Term of this Court, or to the same time when the case of VINCENT GUGLIELMELLI will be heard for argument.

Sworn to before me this  
4th day of January, 1957

ARTHUR SIEGEL  
Notary Public, State of New York  
No. 03-3657710  
Qualified in Bronx County  
Commission Expires March 30, 1957

ONLY COPY AVAILABLE

CS FREDERICK J. SIEGEL

NEW YORK SUPREME COURT  
APPELLATE DIVISION : FIRST DEPARTMENT

A 166

----- X  
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

FRANK CIAPETTA,

Defendant-Appellant.

----- X  
State of New York )  
County of New York) ss:

FREDERICK J. MILLER, being duly sworn, deposes and says:

That I am the attorney for the Appellant and am fully familiar with all the facts and circumstances herein.

That the father of the Appellant passed away some time in the Spring of 1956 shortly after your deponent filed the Notice of Appeal, and the family is without funds of any sort whatsoever, however, your deponent will continue with the appeal without receiving a fee.

There is a co-defendant of the Appellant, one VINCENT GUGLIELMELLI, who is represented by JACOB W. FRIEDMAN, Esq., 170 Broadway, New York City, who is appealing from the same order and it is my understanding that the argument of that appeal is on the calendar for the January 1957 Term of this Court.

Your deponent is of the opinion that the facts, circumstances and law are identical in both appeals and your deponent has discussed this matter with the Appeals Bureau of the District Attorney's Office; Bronx County and it has been agreed by and between us that the decision of the case of VINCENT GUGLIELMELLI shall be binding upon the Appellant herein.

WHEREFORE, deponent respectfully prays that the time of the Appellant be enlarged, and this appeal be set down for a hearing at the same time as the case of VINCENT GUGLIELMELLI.

Sworn to before me this  
day of November, 1956

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NEW YORK SUPREME COURT  
APPELLATE DIVISION : FIRST DEPARTMENT

----- X  
THE PEOPLE OF THE STATE OF NEW YORK.

Respondent.

-against-

FRANK CIAPETTA.

Defendant-Appellant.

ONLY COPY AVAILABLE

----- X  
Motion by defendant-appellant for an Order enlarging the time of the defendant-appellant to perfect his appeal and bring the same on for argument until the April, 1957. Term of the Appellate Division. First Judicial Department. and for such other and further relief as to the Court may seem just and proper.

Notice for Tuesday. January 15th. 1957.

Dated: New York, New York  
January 4th. 1957

FREDERICK J. MILLER  
Attorney for Defendant-Appellant

HON. DANIEL V. SULLIVAN  
Attorney for Respondent

THE PEOPLE OF THE STATE OF  
NEW YORK

against  
FRANK CIAPETTA

ONLY COPY AVAILABLE

Defendant

SIRS:

PLEASE TAKE NOTICE, that the defendant hereby appeals to the Appellate Division of the Supreme Court, First Department, from an Order of Hon. EUGENE G. SCHULZ, entered in the Office of the Clerk of the County Court, Bronx County, on or about the 6th day of December 1955, denying defendant's motion to vacate judgment of conviction herein and from each and every part of said order and from the whole thereof.

Dated, New York, January 13, 1956.

Yours, etc.

FREDERICK J. MILLER  
Attorney for Defendant  
320 Broadway  
New York 7, N. Y.

TO Hon. Daniel V. Sullivan  
District Attorney's Office  
851 Grand Concourse  
Bronx, New York

Clerk of County Court  
851 Grand Concourse  
Bronx, New York